

2006

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### Recommended Citation

Emily I. Krause, *Take My Property Please! Who Should Bear the Burden of Cleaning Up Toxic Methamphetamine Lab Waste?*, 56 Cath. U. L. Rev. 187 (2007).

Available at: <https://scholarship.law.edu/lawreview/vol56/iss1/7>

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## TAKE MY PROPERTY PLEASE! WHO SHOULD BEAR THE BURDEN OF CLEANING UP TOXIC METHAMPHETAMINE LAB WASTE?

*Emily I. Krause*<sup>+</sup>

When Kent and Cindy Needham purchased their second home to save additional money to purchase their dream home, they had no idea that their purchase would quickly lead them near bankruptcy.<sup>1</sup> Shortly after the Needhams moved into their second home, they began experiencing physical ailments including blisters and exacerbated symptoms of Mrs. Needham's dormant multiple sclerosis.<sup>2</sup> Unfortunately, their physical reactions were symptoms of a larger problem that detrimentally affected the Needham's finances.<sup>3</sup> The house had been used as a laboratory to "cook" methamphetamine, resulting in hazardous chemical residue that leached into the porous surfaces of their home, costing the Needhams thousands of dollars for the professional inspection and cleanup.<sup>4</sup>

As much as it may seem that this unfortunate story is an isolated incident, the Needhams' home-buying experience is not unique. Newspapers and magazines across the country report similar incidents of homeowners unknowingly moving into former methamphetamine laboratories, who discover the history of their home's use upon experiencing detrimental health effects and spend thousands of dollars to clean up the home or

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1. Richard Jerome et al., *Home Toxic Home?: Buyer Beware: Owners of Homes Once Used as Methamphetamine Labs Are Having Health Problems—and Sometimes Going Broke Trying to Clean Up Their Toxic Houses*, PEOPLE, Aug. 8, 2005, at 50, 52-53.

2. *Id.* at 52.

3. *Id.* at 53.

4. *Id.* at 52-53. Shortly after moving in, a neighbor told the Needhams that the person who sold the property to them was also the methamphetamine manufacturer who caused the contamination. *Id.* at 52.

attempt to resell it to recover their costs.<sup>5</sup> State legislatures<sup>6</sup> are taking note of the growing problems associated with contamination of residential properties<sup>7</sup> used as methamphetamine labs and are working toward combating these problems by enacting statutes that establish standards for cleaning up the hazardous chemical waste that is left behind.<sup>8</sup>

However, for many property owners, the problems associated with methamphetamine contamination remain. In the interest of protecting the public, some states place the burden of cleaning up methamphetamine waste on the property owners inhabiting the property when the

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5. See *id.* at 52-54 (documenting the experiences of the Needhams in California in addition to the experiences of homeowners in Minnesota and Colorado); *New Law Requires Disclosure of Meth Production When Selling Property: Traces of Chemicals, Residue May Remain in House*, ABERDEEN AM. NEWS, July 24, 2005, at 5B (documenting attempt of new law to prevent similar cases in South Dakota); Karen Youso, *Hidden Hazard: Is the House You're Buying a Former Meth Lab? A New Law Will Make it Easier to Find Out. But the Safety Net Has Holes.*, STAR TRIB., June 26, 2005, at A1 (documenting the experiences of homeowners in Minnesota).

6. The federal government has also made an effort to combat the spread of methamphetamine and the dangers associated with its manufacture by introducing legislation directed at the methamphetamine problem. See Methamphetamine Remediation Research Act of 2005, H.R. 798, 109th Cong. §§ 1, 3-4, 6 (2005) (providing federal funding for studies regarding effective environmental cleanup of methamphetamine laboratories and for the establishment of cleanup guidelines); Federal Emergency Meth Lab Cleanup Funding Act of 2005, S. 259, 109th Cong. § 2 (2005) (providing for the use of federal forfeiture funds to cover 90% of the costs of cleaning up a methamphetamine laboratory if "the property owner did not have knowledge of the existence or operation of such laboratory before the law enforcement action to close it; or . . . the property owner notifies law enforcement not later than 24 hours after discovering the existence of such laboratory"); Clean, Learn, Educate, Abolish, Neutralize, and Undermine Production (CLEAN-UP) of Methamphetamines Act, H.R. 13, 109th Cong. §§ 102-03 (2005) (providing federal funding for cleanup of methamphetamine contamination on federal property and agricultural land); see also *Meth Problem Demands Multi-Pronged Offensive*, U.S. FED. NEWS, May 11, 2005, available at 2005 WLNR 7553929 (discussing the federal legislative initiative in Illinois and Minnesota).

7. Residential property is not the only type of property that is used for methamphetamine manufacture and subsequently contaminated. See CLEAN-UP of Methamphetamines Act, H.R. 13, §§ 101-02 (recognizing need to provide remedy for methamphetamine contamination on federal land and agricultural land); Nitza E. Coleman, Comment, *After the Bust: Landowner's Liability When the Property Is Used for the Manufacture of Methamphetamine*, 13 SAN JOAQUIN AGRIC. L. REV. 109, 109, 130-32 (2003) (discussing methamphetamine contamination in rural areas affecting agricultural land).

8. See MONT. CODE ANN. § 75-10-1301 (2005) ("Remediation of properties [contaminated by the manufacture of methamphetamine] has been frustrated by the lack of a decontamination standard. The purpose of this part is to protect the public health, safety, and welfare by providing specific cleanup standards . . ."); WASH. REV. CODE ANN. § 64.44.005 (West 2005) ("The legislature finds that some properties are being contaminated by hazardous chemicals used in unsafe or illegal ways in the manufacture of illegal drugs. Innocent members of the public may be harmed by the residue left by these chemicals when the properties are subsequently rented or sold without having been decontaminated.").

contamination is discovered.<sup>9</sup> Therefore, property owners who find or receive notice that their property was used to manufacture methamphetamine are in the same position as the Needhams under the new legislation—forced to pay professional inspectors and cleaning firms to decontaminate their property to remain in compliance with state law.<sup>10</sup>

With the enactment of these new cleanup laws, there is a tension developing between individual property owners who desire to protect the investment they have made in their property and government actors who desire to protect the public by cleaning up hazardous environmental waste as soon as it is discovered.<sup>11</sup> For example, at a public hearing concerning a proposed ordinance in a North Dakota county that would require property owners to pay cleanup costs, a county commissioner justified placing the burden on property owners by citing “a certain degree of financial responsibility” that comes with owning property.<sup>12</sup> Meanwhile, a county resident asserted, “I’m not getting stuck with the bill . . . I won’t pay for it unless I get caught.”<sup>13</sup>

This tension between the individual property owner and the state is not new in the area of property law; as one scholar explains: “Property regimes always consist of some individual rights, mixed with some rights shared with nearby associates or neighbors, mixed with still more rights shared with a larger community, all held in relatively stable but nevertheless changing and subtly renegotiated relationships.”<sup>14</sup> The relationship between individuals and the government is exemplified in the Takings Clause: “private property [shall not] be taken for public use, without just compensation.”<sup>15</sup> When the balance within these relationships is threat-

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9. See Kira Millage, *Measure Would Force Meth-Lab Cleanup*, BELLINGHAM HERALD, July 9, 2005, at 3A, available at LEXIS (acknowledging responsibility of property owners to pay cleanup costs under existing Washington law); Elisa L. Rineheart, *Cleanup Law Irks Residents: Plan Would Require Property Owners To Clean Up Drug Labs*, GRAND FORKS HERALD, May 25, 2005, at 1A (reporting that property owners contested the provision of a proposed ordinance for a county in North Dakota requiring property owners to pay the cost of environmental cleanup); Betsy Z. Russell, *Law Targets Meth Lab Messes in Idaho: New Cleanup Rules Aim To Return Properties to Healthful Standards*, SPOKESMAN-REV., June 7, 2005, at A1 (acknowledging expensive cleanup costs for property owners under new Idaho law).

10. See Jerome et al., *supra* note 1, at 53 (regarding the experiences of the Needhams); Millage, *supra* note 9 (Washington); Rineheart, *supra* note 9 (Minnesota); Russell, *supra* note 9 (Idaho).

11. See, e.g., Rineheart, *supra* note 9 (stating that the county needs to investigate the situation further before enacting the regulation).

12. *Id.*

13. *Id.*

14. Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 YALE L.J. 601, 631 (1998).

15. U.S. CONST. amend. V.; U.S. CONST. amend. XIV, § 1; see also *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Justice Holmes, when discussing the scope of the police power, stated:

ened by an individual property owner refusing to recognize the police power of the state or the state refusing to recognize the property rights of the individual property owner, the analysis employed in the United States Supreme Court's takings jurisprudence can be utilized to "renegotiate" the relationship between the individual property owner and the state.<sup>16</sup>

This Comment argues that the methamphetamine cleanup legislation creates an imbalance between individual property owners and the states, and can be renegotiated by using the analysis of the Court's takings jurisprudence. Specifically, it argues that legislation requiring property owners to clean up methamphetamine waste could be a regulatory taking<sup>17</sup> under the Fifth Amendment to the United States Constitution as applied to the states by the Fourteenth Amendment.<sup>18</sup> In addition, it argues that the best way to remedy the burden placed on property owners forced to clean up methamphetamine contamination is to amend the current legislation to include an "innocent landowner defense" modeled on federal and state environmental law.

To understand the extent of the problem with methamphetamine and the particular effect that its manufacture has on residential property, one must understand the nature of the methamphetamine "threat."<sup>19</sup> The Drug Enforcement Administration has reported that over the past sev-

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Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits, or the contract and due process clauses are gone.

*Pa. Coal Co.*, 260 U.S. at 413.

16. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1014 (1992) (illustrating the need to balance the tension between government and private property interests, the Court wrote: "[I]f the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits"); *Pa. Coal Co.*, 260 U.S. at 413 ("As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits.").

17. See *Lucas*, 505 U.S. at 1014-15 (citing *Pa. Coal Co.*, 260 U.S. at 415). The Court, prior to analyzing the facts of the case in *Lucas*, discussed the history of takings jurisprudence and differentiated between takings that amount to a "physical 'invasion'" of property and "regulatory takings," or where takings occur when a "regulation . . . go[es] 'too far.'" *Lucas*, 505 U.S. at 1015 (quoting *Pa. Coal Co.*, 260 U.S. at 415).

18. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 122 (1978) (mentioning the incorporation of the Fifth Amendment Takings Clause into the Fourteenth Amendment).

19. *Threat to Rural Communities From Methamphetamine Production, Trafficking, and Use: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 106th Cong. 12 (2000) (statement of George J. Cazenavette, Special Agent in Charge, New Orleans Div. Office, Drug Enforcement Admin.) [hereinafter Cazenavette Statement].

eral years, abuse of methamphetamine<sup>20</sup> has “significant[ly] increase[d],” with cases of abuse “starting on the West Coast, and rapidly expanding into the Midwest and, to a lesser extent, the Southeastern United States.”<sup>21</sup> In addition, “domestic [production of methamphetamine by United States citizens] is . . . [a] significant problem,” because methamphetamine is easily produced with common or easily procured household chemicals and equipment.<sup>22</sup>

Both the ease with which methamphetamine is produced and the extent of the methamphetamine addiction across the United States contribute to the fact that methamphetamine manufacturing in the United States is performed in small “mom and pop labs” located among residential properties such as houses, apartments, and hotels, in addition to automobiles.<sup>23</sup> Further, these labs are clandestine not only because they involve

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20. Methamphetamine is a highly addictive drug that “accelerates the body’s metabolism.” Dan Hannan, *Meth Labs: Understanding Exposure Hazards and Associated Problems*, 50 PROF. SAFETY 24, 25 (2005); see also Cazenavette Statement, *supra* note 19, at 12-13 (reporting before Congress).

21. Cazenavette Statement, *supra* note 19, at 12. The expansion of the drug has been characterized as “wildfire.” See News Release, Drug Enforcement Administration, DOJ and DEA Announce Results of First Major Meth Operation (Aug. 31, 2005), available at <http://www.usdoj.gov/dea/pubs/states/newsrel/seattle083105.html> (titling a recent methamphetamine drug operation and partnership between the Department of Justice and the Drug Enforcement Agency “Operation Wildfire”).

22. *Id.* at 14. The DEA describes the domestic lab manufacturing process as follows: A user can go to retail stores and easily purchase the vast majority of the ingredients necessary to manufacture the drug. Items such as rock salt, battery acid, red phosphorous road flares, pool acid, and iodine crystals can be utilized to substitute for some of the necessary chemicals. Precursor chemicals such as pseudoephedrine can be extracted from common, over-the-counter cold medications. A clandestine lab operator can utilize relatively common items such as mason jars, coffee filters, hot plates, pressure cookers, pillowcases, plastic tubing, gas cans, etc., to substitute for sophisticated laboratory equipment. Unlike Fentanyl, LSD, or other types of dangerous drugs, it does not take a college-educated chemist to produce methamphetamine.

*Id.* For a more extensive analysis of the various methods of methamphetamine manufacture and the chemicals involved, see *Kansas v. LaMae*, 998 P.2d 106, 109 (Kan. 2000) (citing court testimony of Drug Enforcement Administration Agent in a criminal appeal of a felony murder charge arising from manufacture of methamphetamine who described the “heat reduction method of methamphetamine production” and chemicals involved); Hannan, *supra* note 20, at 25-26 (describing types of laboratories and chemicals involved).

23. Cazenavette Statement, *supra* note 19, at 14; Hannan, *supra* note 20, at 24-25; see also W. VA. CODE ANN. § 60A-10-2(a)-(b) (LexisNexis 2005) (dealing not with the regulation of methamphetamine cleanup, but instead focusing on preventing the manufacture of methamphetamine, its findings include extensive references to the environmental and public impact of methamphetamine manufacture). See generally ARIZ. REV. STAT. ANN. § 12-990(1) (2003) (defining “[c]landestine drug laboratory” to include real property, mobile homes, recreational vehicles); MONT. CODE ANN. § 75-10-1302(2)(a) (2005) (defining “[i]nhabitable property” as property “primarily occupied by people . . . including a storage facility, mobile home, or recreational vehicle”); WASH. REV. CODE ANN. § 64.44.010(6) (West, Westlaw through 2006 legislation) (defining “[p]roperty . . . involved in or affected by the unauthorized manufacture, distribution, or storage of hazardous chemicals. . . .

criminal activity and are not easily detected by law enforcement,<sup>24</sup> but also because they are not easily detected by future property owners prior to purchasing the affected property.<sup>25</sup> After time has passed, the illegal use of the property as a methamphetamine lab may be hidden from prospective buyers with a good ventilation system and a fresh coat of paint,<sup>26</sup>

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includ[ing] . . . single-family residences, units of multiplexes, condominiums, apartment buildings, boats, motor vehicles, trailers, manufactured housing, any shop, booth, garden, or storage shed, and all contents of the items referenced in this subsection"); W. VA. CODE ANN. § 60A-10-2.

24. See Cazenavette Statement, *supra* note 19, at 12 (referring to methamphetamine manufacture in the United States as occurring in "clandestine laboratories").

25. Hannan, *supra* note 20, at 28, 31; see also MONT. CODE ANN. § 75-10-1301 (acknowledging the difficult nature of detecting a former methamphetamine lab by stating in the findings that "[i]nnocent members of the public may be harmed when they are *unknowingly* exposed to . . . residues" left after the manufacture of methamphetamine) (emphasis added). Other statutes may not explicitly refer to the lack of knowledge surrounding purchase of former methamphetamine labs, but there are implied references to notice or disclosure provisions within these statutes because they are directed at remedying the lack of knowledge. See, e.g., ARIZ. REV. STAT. ANN. § 12-1000(F) (Supp. 2005) (requiring notice to prospective buyers or lessees until current owner cleans up the property and providing prospective buyers or lessees with option to cancel the purchase or rental agreement if the current owner does not comply with the notice requirement).

In some cases, presence of a potential contamination problem may be obvious, even to an untrained observer. See ARIZ. ADMIN. CODE § R4-30-305(B)(4)(a)-(e) (recognizing "areas highly suggestive of contamination" to include stained furniture, flooring, and appliances); 10A N.C. ADMIN. CODE 41D.0102(4) (2005) (recognizing that initial visual assessment of property can be useful to signal methamphetamine contamination when there are chemical spills, chemical odors, or stains); ARK. DEP'T OF HEALTH & HUMAN SERVS., CLANDESTINE METHAMPHETAMINE LABORATORY CLEANUP GUIDELINES 5 (2006), [http://www.healtharkansas.com/pdf/adh\\_methguidelines\\_2005.pdf](http://www.healtharkansas.com/pdf/adh_methguidelines_2005.pdf) (noting that assessment of property for "visibly stained, discolored or etched fixtures" will aid in the identification of methamphetamine contamination). However, confirmation that a property is contaminated by methamphetamine and its chemical residue from the manufacturing process is left to those who are trained to detect the contamination. See, e.g., ARIZ. ADMIN. CODE § R4-30-305(A)(1)-(4) (2005) (explaining that the scope of contamination is determined by an on-site supervisor's assessment of law enforcement records and any other information relevant to the nature of the contamination in addition to conducting "appropriate testing for corrosive, flammable, combustible, and toxic atmospheres during the initial entry in the residually contaminated portion of the real property"). For example, Arizona has enacted regulations mandating that testing be conducted by certified professionals both before and after the methamphetamine contamination is detected and cleaned. *Id.* § R4-30-305(A)(3)-(4), (C)(1)-(4). The decision to require a trained professional to assess a property for decontamination is likely based on the professional equipment required for testing and the potential danger of exposure to chemicals by those who are untrained to handle them. See *id.* § R4-30-305(A)(3)(c) ("The on-site supervisor shall . . . [w]ear the appropriate personal protective equipment for the condition(s) assessed"); *id.* § R4-30-305(A)(4) (inspection conducted using "LEL/O2 meter, pH paper, PID, FID, or equivalent equipment"); *id.* § R4-30-305(C)(4)(f) ("All testing equipment shall be properly equipped and calibrated for the types of compounds to be analyzed.").

26. Hannan, *supra* note 20, at 31 ("The approach and level of effort necessary to decontaminate a home varies significantly. . . . Where allowed to self-perform the decon-

especially prior to the new reporting requirements that are being adopted by states.<sup>27</sup>

Hazardous residue from methamphetamine manufacture must be removed because of the harmful health effects and environmental pollution<sup>28</sup> associated with exposure to methamphetamine and its chemical by-products.<sup>29</sup> With the cost of methamphetamine cleanup running in the thousands and sometimes tens of thousands of dollars,<sup>30</sup> both property

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tamination, the author is aware of cases in which homeowners have hosted a 'cleaning party' with family and friends—an unregulated activity that presents potential hazards to those not trained to identify and protect themselves from chemical and drug residue exposure.”); Rineheart, *supra* note 9 (stating that homeowners at a public hearing on a proposed county ordinance in North Dakota declared that they would rather clean their property “themselves rather than alert the authorities” that their property was used as a methamphetamine lab). As Hannon describes, methamphetamine manufacture will likely result in detectable gases or odors in the air and noticeable stains on walls and carpets. Hannan, *supra* note 20, at 28-29. However, gases may dissipate over time if a “home has been well ventilated.” *Id.* at 29. Also, carpets can be removed, and walls can be repainted. See Rineheart, *supra* note 9. This does not mean that the toxic chemicals or the danger from exposure to the toxic chemicals has been removed. See Hannan, *supra* note 20, at 29-31 (describing more extensive process for removal of hazardous chemicals); Russell, *supra* note 9 (citing government affairs director for the Idaho Association of Realtors who explained that the extent of the cleanup depends on the extent of the contamination, and quoting the owner of an environmental cleanup firm who detailed the extent of the professional cleaning process).

27. See, e.g., ARIZ. REV. STAT. ANN. § 12-1000(F) (requiring notice to prospective buyers or lessees until current owner cleans up the property and providing prospective buyers or lessees with option to cancel the purchase or rental agreement if the current owner does not comply with the notice requirement). For an example of one way in which Washington State publicizes methamphetamine contaminated properties, see Washington State Department of Health, List of Sites Contaminated by Clandestine Drug Labs, <http://www.doh.wa.gov/ehp/ts/CDL/cdlsitelist.xls> (last visited Sept. 7, 2006) (listing over 2000 properties contaminated by methamphetamine in the state of Washington).

28. See Hannan, *supra* note 20, at 24-25. Although studies are not conclusive as to the exact health effects that result from exposure to methamphetamine and its by-products, *id.*, the individual chemicals involved have been associated with health effects such as respiratory problems and skin irritation. See Washington State Department of Health, Illegal Methamphetamine Labs, <http://www.doh.wa.gov/ehp/ts/CDL/MethFS.htm>. (last visited Aug. 28, 2006) (matching the symptoms that the Needhams and others have experienced upon moving into a former methamphetamine lab); see also Jerome et al., *supra* note 1, at 52-54 (discussing the symptoms the Needhams and others experienced).

29. W. VA. CODE ANN. § 60A-10-2(b)-(f). The West Virginia Legislature, when it enacted the Methamphetamine Laboratory Eradication Act, cited the health and environmental problems associated with methamphetamine production before stating, “[t]hat it is in the best interest of every West Virginian to develop a viable solution to address the growing methamphetamine problem in the State of West Virginia.” *Id.*; see also Hannan, *supra* note 20, at 24-25; Jerome et al., *supra* note 1, at 52-53.

30. W. VA. CODE ANN. § 60A-10-2(e) (“[The] average remediation cost [is] five thousand dollars.”); Jerome et al., *supra* note 1, at 53. Some states make a list of environmental cleanup firms available to their residents. See, e.g., Washington State Department of Health, Washington State Department of Health Decontamination Contractors, <http://www.doh.wa.gov/ehp/ts/CDL/CDLContractorList.htm> (last visited Aug. 28, 2006).



owners and states are reluctant to bear the burden of the cleanup costs.<sup>31</sup> Therein lies the problem: no one wants to bear the burden of cleaning up toxic methamphetamine lab waste.

The purpose of this Comment is to analyze state legislation that responds to the dangers of toxic chemical exposure from former methamphetamine laboratories in residential real property due to the rising use of methamphetamine by focusing on the potential for innocent property owners and subsequent purchasers to be left with the cleanup bill. First, this Comment discusses the tension in property law between individual property owners and states, which is highlighted in constitutional takings jurisprudence. Second, this Comment reviews current federal and state legislation designed for the cleanup of environmental contamination to illustrate how contamination has been dealt with prior to the enactment of specific methamphetamine statutes. Third, this Comment compares legislation from a selection of states that requires property owners to clean up methamphetamine waste and analyzes the burden placed on property owners to determine whether the legislation amounts to a regulatory taking of their property. Finally, this Comment argues that regulations requiring property owners to bear the costs of cleanup could amount to a taking, but in order to provide more certain protection for property owners, state legislatures that are implicated should amend their legislation to reflect the language proposed in this Comment.

## I. REGULATORY TAKINGS AND ENVIRONMENTAL LAW: ARTICULATING THE INTERESTS OF THE GOVERNMENT AND THE PROPERTY OWNER

### A. *From Pennsylvania Coal Co. to Tahoe: Regulatory Takings Jurisprudence in the United States Supreme Court Involves a Balancing Act*

Because the focus of this Comment is on particular statutory regulations dealing with the cleanup of methamphetamine residue, the analysis will follow regulatory takings jurisprudence. In *Pennsylvania Coal Co. v. Mahon*, the Supreme Court concluded that the protection afforded property owners in the Takings Clause of the Fifth Amendment covered not only physical takings of property, but also regulatory takings, when it struck down a Pennsylvania statute “forbid[ding] the mining of anthracite coal in such way as to cause the subsidence of . . . any structure used as a

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However, a quick search of one of the firms did not reveal the exact cost; the website only revealed that the firm is committed to providing “cost-effective” service. See Kleen Environmental Technologies, Inc., About KET, <http://www.kleenenvironmental.com/docs/about.htm> (last visited Aug. 28, 2006). Another search of a firm serving the Western United States achieved the same result: the firm explained on its website that it provided service at “competitive prices.” See Meth Lab Cleanup Company, The Company, <http://www.methlabcleanup.com/company.html> (last visited Aug. 28, 2006).

31. See Rineheart, *supra* note 9.

human habitation.”<sup>32</sup> In setting down the “general rule . . . that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking,”<sup>33</sup> the Court reasoned that the coal mining statute violated the Takings Clause because the statute went “too far.”<sup>34</sup> Pennsylvania’s asserted interest in providing protection to the public by preventing damage to structures from subsidence of land above coal mining operations was insufficient to justify the interference with the rights of property owners because the danger sought to be avoided threatened the property owners themselves.<sup>35</sup> Concluding its analysis in invalidating the statute, the Court cited the economic interest in coal mining and determined that because the statute interfered with this interest, the statute constituted a taking.<sup>36</sup>

Almost sixty years later, the Court returned to the takings inquiry in *Penn Central Transportation Co. v. New York City*,<sup>37</sup> reviewing the history of the Court’s takings jurisprudence and conceding that the Court “has been unable to develop any ‘set formula’ for determining when” a taking has occurred.<sup>38</sup> The Court explained that the analysis in a takings inquiry

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32. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 412-13, 415 (1922).

33. *Id.* at 415.

34. *Id.* at 413-15. The Court further explained that it was not invalidating the statute as applied, but rather on the statute’s face, stating:

If we were called upon to deal with the plaintiffs’ position alone, we should think it clear that the statute does not disclose a public interest sufficient to warrant so extensive a destruction of the defendant’s constitutionally protected rights.

But the case has been treated as one in which the general validity of the act should be discussed. . . . It seems, therefore, to be our duty to go farther in the statement of our opinion, in order that it may be known at once, and that further suits should not be brought in vain.

*Id.* at 414.

35. *Id.* at 413-16. To illustrate the difference when a “regulation goes too far,” from when it does not, the Court distinguished the statute in *Pennsylvania Coal Co.* from that of *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914). *Pa. Coal Co.*, 260 U.S. at 415. The Court concluded that the statute in *Plymouth* preventing coal mining within a certain distance from the surface of the property line was a valid exercise of the police power of the legislature because the statute was directed at mine safety for employees working in the mine, *id.*, as opposed to use of the police power to protect the “personal safety” of a property owner or the maintenance of a “single private house.” *Id.* at 413-14.

36. *Id.* at 414-15.

37. 438 U.S. 104, 123 (1978).

38. *Id.* at 124. Over the years, scholars and practitioners have also attempted to tackle the meaning of Holmes’ “general rule” in *Pennsylvania Coal Co. v. Mahon*. Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on Penn Central Transportation Co. v. City of New York*, 13 WM. & MARY BILL RTS. J. 653, 656 (2005) (“Unfortunately, courts have failed to draw any sort of discernable line separating [a legitimate regulation and one that goes ‘too far’], shuttling unpredictably between competing doctrines and producing conflicting results.”); William W. Wade, “*Sophistical and Abstruse Formulas*” Made Simple, Or: Advances in Measurement of Penn Central’s Economic Prongs and Estimation of Economic Damages in Federal Claims and Circuit Courts, SL012

necessarily involves a case by case balancing of factors including "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as "the character of the governmental action."<sup>39</sup> In applying these factors to a New York City zoning ordinance protecting historic landmarks, the Supreme Court concluded that Penn Central's interest in contracting to build a multi-story office building above Grand Central Terminal did not outweigh the city's interest in preserving Grand Central Terminal as a designated historic landmark.<sup>40</sup>

The analysis established in *Penn Central* became the Court's standard<sup>41</sup> for determining whether or not a regulatory taking existed, no matter what categorization was given to the regulation at issue, whether "temporary" or "permanent."<sup>42</sup> The Court's decision in *First English Evangelical*

A.L.I.-A.B.A. CONTINUING LEGAL EDUC. COURSE OF STUDY 303, 358 (2005) [hereinafter Wade, COURSE OF STUDY] ("How far is 'too far' has haunted Takings Jurisprudence since *Pennsylvania Coal v. Mahon* (1922)."). Scholars have also criticized the analysis provided in *Penn Central* for the same reason; the test is one that is not easily applied to a regulatory takings issue. Kanner, *supra* at 655-56; William W. Wade, *Penn Central's Economic Failings Confounded Takings Jurisprudence*, 31 URB. LAW. 277, 277-81, 308 (1999) (describing the conflict between economic theory and legal language in the *Penn Central* balancing factors); Wade, COURSE OF STUDY, *supra*, 306-09 (calling for "guideposts" in regulatory takings analysis).

39. *Penn Cent. Transp. Co.*, 438 U.S. at 124. In doing so, the Court revisited its opinion in *Pennsylvania Coal Co.*, naming it the "leading case" to illustrate a regulation that interfered with "distinct investment-backed expectations as to amount to a 'taking.'" *Id.* at 127.

40. *Id.* at 115-16, 130-38.

41. Justice O'Connor named *Penn Central* the "polestar" of regulatory takings jurisprudence in her concurring opinion in *Palazzolo v. Rhode Island*. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring).

42. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 306-07, 314-22 (1987) (finding that an interim land use regulation preventing property owner from constructing buildings on property in flood hazard area was a potentially compensable taking despite the temporary nature of the land use restriction; "just compensation" cannot be effected simply by repealing regulation). Even though the Court in *First English Evangelical* focused primarily on the issue of whether or not "just compensation" should have been paid to the church for the temporary taking, see *id.* at 306-07, 314-17, the Court emphasized, "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings." *Id.* at 318. Despite the Court's focus in the case, the Court acknowledged that the preliminary inquiry in a temporary takings problem still revolves around whether or not the "regulation goes too far." See *id.* at 306-07, 316, 318-19 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). Therefore, although the Court reviewed a "temporary taking," the initial takings analysis remained the same. See *Single v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-40 (2005).

A form of the *Penn Central* analysis was also used in *Lucas v. South Carolina Coastal Council*, for a "total taking" inquiry. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1007-09, 1019, 1030 (1992) (finding that a statute directed at preventing beach erosion and protecting sand dunes prevented property owner from building on residential lots purchased for constructing single-family homes was a "total taking" because the statute rendered the property "valueless"). The Court, in analyzing the particular taking at issue in

*Lutheran Church v. County of Los Angeles* was the first to address whether or not a “temporary taking” qualifies for “just compensation” under the Takings Clause of the United States Constitution.<sup>43</sup> In *First English Evangelical*, the Court determined that a property owner seeking monetary compensation could bring a claim for a temporary taking because the emergency safety ordinance at issue restricted the use of the property owner’s land.<sup>44</sup> The Court reviewed the language of the Fifth Amendment and concluded that the language did not prevent the government from taking private property, but required payment for its use.<sup>45</sup> The Court recognized the burden that the Takings Clause places on the government in the government’s ability to freely conduct its business when it is required to compensate private owners for the government’s use of private land.<sup>46</sup> Yet the Court dismissed this burden without concern when it reiterated its position in *Pennsylvania Coal Co.*: “[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”<sup>47</sup> In other words, the government’s interest in regulation does not change its obligation to pay private property owners when the Takings Clause is implicated.<sup>48</sup> Based on the Court’s determination that a temporary taking was compensable under the Takings Clause, the county could be required to pay for the value of its use of the property owner’s land during the period that the landowner was restricted by the emergency safety ordinance.<sup>49</sup>

In 2002, the Supreme Court revisited *First English Evangelical* when it determined that a thirty-two month moratorium on property development designed to allow the state legislatures of California and Nevada to implement legislation to protect Lake Tahoe did not amount to a regulatory taking in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*.<sup>50</sup> The property owners argued that *First English Evan-*

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*Lucas*, developed a new “‘total taking’ inquiry,” *id.* at 1030-31, involving the application of existing state common law nuisance actions to a property owner’s reasonable interests in his property. *Id.* at 1027-32. However, in practice the “total taking” inquiry is similar to the test set out in *Penn Central* because a type of balancing is still required. *See id.* at 1016 n.7, 1019 n.8, 1032 n.18; *see also Lingle*, 544 U.S. at 537-40; *Lucas*, 505 U.S. at 1047 (Blackmun, J., dissenting).

43. *See First English Evangelical*, 482 U.S. at 310 (noting that previous attempts to reach the merits of the temporary takings questions were prevented by procedural obstacles in those cases).

44. *Id.* at 314-20.

45. *Id.* at 314-15.

46. *Id.* at 321.

47. *Id.* at 321-22 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).

48. *See id.* at 321-22.

49. *See id.* at 322.

50. 535 U.S. 302, 306-09, 341-43 (2002).

*gelical* applied, asserting that the Court's holding stood for the proposition that a moratorium on property development constituted a per se taking.<sup>51</sup> The Court rejected the per se takings analysis proposed by the property owners.<sup>52</sup> In doing so, the Court reminded the property owners that *First English Evangelical* did not decide whether a taking had occurred, merely that *if* a taking had occurred, it would require compensation despite its temporary nature.<sup>53</sup> Further, the Court explained that the property owners' dependence on a per se takings rule was misplaced because of the rarity of finding a per se taking in a case involving a challenged regulation.<sup>54</sup> Instead, the *Penn Central* test remained the appropriate method for determining whether the moratorium on development constituted a regulatory taking.<sup>55</sup> Again, the Court emphasized that regulatory takings jurisprudence rests on the particular facts of the case, and emphasized that this meant a regulatory takings analysis could go "one way or the other" depending on the facts of a particular case.<sup>56</sup> In *Tahoe*, the analysis determined that a taking had not occurred.<sup>57</sup>

Continuing along the line of *Pennsylvania Coal Co.* and *Penn Central Transportation Co.*, balancing the interests of the government in regulating use of property against the economic interests of the property owner in the use of his property, the Court set out further characterizations of takings, each with unique forms of analysis, yet all employing some form of a balancing test.<sup>58</sup> In *First English Evangelical*, the Court determined

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51. *Id.* at 320-21.

52. *Id.* at 321.

53. *Id.* at 328-29.

54. *Id.* at 332.

55. *Id.* at 321.

56. *Id.* at 326-27, 337.

57. *Id.* at 334, 342-43. The Court suggested the outcome may have been different had the property owners brought their takings claims as separate "as applied" challenges. *Id.* at 334. This was because the facial challenge to the moratorium required the property owners to rely on a per se takings analysis and prevented them from developing the facts that would be applied to a *Penn Central* analysis. *Id.* at 334-35.

58. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-40 (2005). In writing for the majority, Justice O'Connor surveyed the course of takings jurisprudence in the Supreme Court and concluded:

Although our regulatory takings jurisprudence cannot be characterized as unified, these . . . inquiries . . . share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. *Accordingly, each of these tests focuses directly upon the severity of the burden that government imposes upon private property rights.*

*Id.* at 539 (emphasis added). Therefore, over the course of takings jurisprudence the tests have basically the same balance of government interests versus private interests at their core. See *id.* at 538-39.

The reason that the Court in *Lingle* reviewed the history of the takings analysis was to determine if a "legitimate state interests" test could also be used to determine if a regula-

that it was possible for a regulation temporarily depriving a property owner of the economic interest in the use of his property to amount to a taking.<sup>59</sup> In *Tahoe*, the Court determined the same thing—that it was possible for a regulation temporarily depriving a property owner of the economic interest in the use of his property to amount to a taking.<sup>60</sup> Given the different outcomes in regulatory takings cases, and because the factual inquiry required of a regulatory takings case could mean that the outcome will go “one way or the other,”<sup>61</sup> it is difficult to predict when a regulatory taking has occurred.<sup>62</sup> What is clear is that within regulatory

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tory taking existed. See *id.* at 540-45. After reviewing the history of the Court’s takings jurisprudence, the Court noted that the “legitimate state interests” test was a product of the Court’s due process jurisprudence. *Id.* at 540. The Court further noted that much of the case law contained a “commingling of due process and takings inquiries,” *id.* at 541, but concluded that the problem with using a due process analysis to answer a takings inquiry was not only because it added confusion in an already confusing area, see *id.* at 542 (admitting that “regulatory takings jurisprudence cannot be characterized as unified”), but also because the due process analysis was inadequate to answer the takings inquiry. *Id.* The Court stated, “the ‘substantially advances [legitimate state interests]’ inquiry reveals nothing about the *magnitude or character of the burden* a particular regulation imposes upon private property rights. Nor does it provide any information about how any regulatory burden is *distributed* among property owners.” *Id.*

Because of the shortcomings of the “legitimate state interests” test as applied to a regulatory takings claim, the Court concluded that it was no longer appropriate for evaluation of takings claims. *Id.* at 540, 542. The Court further attempted to separate the due process inquiry from the takings inquiry by explaining that a finding of a violation of due process because the means and ends of the government regulation do not fit does not necessarily mean that private property has been taken:

The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation. It would make little sense to say that the second owner has suffered a taking while the first has not. Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners. The notion that such a regulation nevertheless “takes” private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.

*Id.* at 543. Therefore, when the Court in *Lingle* traced the history of its takings jurisprudence, it reasserted the appropriateness of the “*Penn Central* inquiry” for regulatory takings challenges. See *id.* at 538-40 (explaining that “regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978)”). This was because the elements of the *Penn Central* test answered the questions essential to a takings challenge—“the *magnitude or character of the burden*,” *id.* at 542, imposed on property owners. See *id.* at 538-40, 542, 548.

59. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 306-07, 314-22 (1987).

60. See *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 333-35, 341-42.

61. *Id.* at 337.

62. Compare *id.* at 341-43, with *id.* at 343-46 (Rehnquist, C.J., dissenting) (illustrating that a different interpretation of the facts as applied to the *Penn Central* analysis would achieve different results, i.e., a finding that a taking occurred versus a finding that a taking had not occurred).

takings jurisprudence there is a constant tension between what is required of the government and what is required of the property owner.<sup>63</sup> If the interests of the government are greater than the interests of the property owner, then the property owner loses the takings claim.<sup>64</sup> Ultimately, the deciding factor is the underlying protection that the Takings Clause affords—that individual property owners should be compensated for burdens they bear for “the public as a whole.”<sup>65</sup>

*B. Liability of Property Owners to Clean Up Environmental Contaminants: CERCLA and its State Counterparts*

Under current federal and state environmental law, the government can constitutionally require property owners to pay for the costs of the cleanup of hazardous material on their property, provided that certain statutory conditions are met.<sup>66</sup> In 1980, Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) in order to provide a legislative scheme for the cleanup and removal of hazardous waste sites.<sup>67</sup> The goals of the Act were to protect the public from exposure to hazardous waste, and to identify and hold liable those who are responsible for the dangerous disposal of hazardous waste.<sup>68</sup> CERCLA provides liability for present and past owners of prop-

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63. Compare *First English Evangelical*, 482 U.S. at 321 (“[M]any of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them.”), with *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 339-42 (citing “[t]he interest in facilitating informed decisionmaking by regulatory agencies” as reason to uphold the development moratorium as constitutional).

64. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (“A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”) (internal citation omitted).

65. See *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O’Connor, J., concurring) (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 123-24).

66. See *Asarco Inc. v. Dep’t of Ecology*, 43 P.3d 471, 472 (Wash. 2002) (stating that environmental cleanup actions under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) “ha[ve] been vigorously litigated in state and federal courts, and ha[ve] been consistently upheld as constitutional”). *Asarco Inc.* itself involved a challenge to Washington’s state counterpart to the federal law that also survived constitutional challenge. See *id.* at 477 (finding the case not ripe for review); *infra* notes 95-100 and accompanying text (summarizing the case).

67. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675 (2000 & Supp. III 2003); see also H.R. REP. NO. 96-1016, pt. 1, at 17-18 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6119-20.

68. See H.R. REP. NO. 96-1016, pt. 1, at 17-18 (“The unfortunate human health and environmental consequence of [current hazardous waste disposal] practices has received national attention amidst growing public and Congressional concern over the magnitude of the problem and the appropriate course of response that should be pursued. Existing law is clearly inadequate to deal with this massive problem.”); see also Diane H. Nowak,

erty that has been designated a hazardous waste site under the statute, and who, when identified, are strictly liable for costs incurred by the federal government for cleaning up the hazardous waste.<sup>69</sup> Cleanup costs associated with liability under CERCLA have amounted to thousands and even millions of dollars.<sup>70</sup> The primary targets of CERCLA liability are larger corporations and owners of commercial real estate<sup>71</sup> who are expected to bear the burden of cleanup costs<sup>72</sup> because at the time CERCLA was enacted, Congress found that corporations were the primary hazardous waste producers.<sup>73</sup> However, the language of CERCLA

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Comment, *CERCLA's Innocent Landowner Defense: The Rising Standard of Environmental Due Diligence for Real Estate Transactions*, 38 BUFF. L. REV. 827, 827 (1990) (discussing legislative history of CERCLA in response to contamination at Love Canal and the purpose CERCLA was designed to achieve).

69. 42 U.S.C. §§ 9601(35)(C), 9607(a) (2000); *New York v. Shore Realty Corp.*, 759 F.2d 1032, 1041 (2d Cir. 1985); H.R. REP. NO. 96-1016, pt. 1, at 1, 17; Judith G. Tracy, *Beyond Caveat Emptor: Disclosure to Buyers of Contaminated Land*, 10 STAN. ENVTL. L.J. 169, 176 (1991); Nowak, *supra* note 68, at 827-28 (describing scope of liability as "broad").

70. Tracy, *supra* note 69, at 171 ("Although contamination at some sites is minor, the cleanup costs of major sites may be as high as \$1 million per acre, and the total cost . . . of contaminated land must be measured by more than cleanup dollars."); Nowak, *supra* note 68, at 830-31 (noting potential "individual cleanup costs ranging from 10 to 100 billion dollars").

71. See H.R. REP. NO. 96-1016, pt. 1, at 18-21 (listing hazardous waste contamination issues created by—among others and with specific company names—chemical companies, the radium industry, and waste disposal companies).

72. See 42 U.S.C. § 9601(40) (Supp. III 2003) (providing lower standard for acquiring knowledge of history of property under CERCLA for a "bona fide prospective purchaser" if property used for residential purposes); Nowak, *supra* note 68, at 843 (noting that expectations placed on commercial property owners are "more rigorous" than those placed on others because of the ability to participate in "arms-length transactions"). In addition, commercial owners of property may be more easily capable of negotiating contribution for cleanup costs from prior owners before liability under CERCLA even becomes an issue. See Nowak, *supra* note 68, at 837 (citing case law that permits parties to include liability costs for environmental cleanup in a purchase agreement, but requires the agreement to include express language regarding the environmental liability). Or, the government in a contribution action to recover its costs for initially cleaning up the environmental waste under CERCLA may seek recovery from only "a few deep pockets," which would likely include commercial property owners. *Id.* at 836.

73. See H.R. REP. NO. 96-1016, pt. 2, at 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6151, 6153 (drafting provisions of CERCLA that would require industrial producers of hazardous waste to pay an excise tax that would fund hazardous waste cleanup, the House Ways and Means Committee wrote: "The committee recognizes that the United States Government must bear some of the costs incurred for this purpose. However, it also believes that these costs generally should be borne by the party responsible for the waste, and alternatively by the industries which create the items most frequently located in inactive waste sites"). These measures, designed to place extensive liability on property owners contributing to the spread of hazardous waste contamination in the United States, were taken after Congress found that hazardous waste sites were a formidable problem. See H.R. REP. NO. 96-1016, pt. 1, at 18-21 ("The United States Environmental Protection Agency has conducted a study to determine the number of inactive and uncontrolled hazardous



does not limit liability to corporations or owners of commercial real estate, rather the Act imposes liability on "any person" who falls within one of the enumerated categories.<sup>74</sup>

Challenges to CERCLA by property owners designated by the government to bear the cleanup costs for hazardous waste disposal are often unsuccessful,<sup>75</sup> with courts often narrowly construing the defenses that CERCLA provides.<sup>76</sup> Specifically, a challenge to CERCLA liability as an unconstitutional taking under the Fifth Amendment is among those defenses that have failed.<sup>77</sup> For example, in *United States v. Northeastern Pharmaceutical & Chemical Co.*,<sup>78</sup> the Eighth Circuit first questioned the defendant chemical corporation's standing to bring a takings claim because the corporation was not the current owner of the property in question, and afterwards rejected the takings claim on its merits.<sup>79</sup> The court determined that the required cleanup protected the health and safety of the public "and restor[ed] value to the property by removing the hazardous substances."<sup>80</sup> Therefore the takings claim against the government could not be sustained.<sup>81</sup> Similarly, in *United States v. Asarco Inc.*,<sup>82</sup> the Idaho federal district court adopted the takings analysis from *Northeast-*

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waste sites in existence. In 1979, the EPA estimated that as many as 30,000 to 50,000 sites existed, of which between 1,200-2,000 present a serious risk to public health. Irrespective of which available or projected statistics are relied upon, *the need for a strong legislative response is evident.*" (emphasis added)). One of the locations cited by Congress as an area of significant concern to public health and safety was Love Canal, where disposal of organic chemicals in a landfill was linked to miscarriages, birth defects and other serious injuries to nearby residents, the legacy of which contributed to Congress' exacting crack-down on hazardous waste producers. See *id.* at 19-21. Congress recognized that the public's reaction to hazardous waste sites like Love Canal and the potential for additional sites demanded federal intervention. See *id.* at 20-21 ("Public opposition to new sites, caused by improper disposal in the past, is growing. Until such opposition can be lessened by demonstrating that hazardous wastes can be disposed of safely, future sites may have to be located on Federal and State lands.").

74. See 42 U.S.C. § 9607(a)(1)-(4). Scholars and practitioners have realized that CERCLA liability is so broad that it would be difficult to conclusively determine that a particular property owner with hazardous waste contamination on his property would not be liable under CERCLA. See JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 600 (5th ed. 2002) (citing Nowak, *supra* note 68; Tracy, *supra* note 69).

75. *Asarco Inc. v. Dep't of Ecology*, 43 P.3d 471, 472 (Wash. 2002) ("CERCLA has been vigorously litigated in state and federal courts, and has been consistently upheld as constitutional.").

76. See Nowak, *supra* note 68, at 837-44.

77. See *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 734 (8th Cir. 1986); *United States v. Asarco Inc.*, No. CV 96-0122-N-EJL, 1999 WL 33313132, at \*1, \*6-7 (D. Idaho Sept. 30, 1999).

78. *Ne. Pharm. & Chem. Co.*, 810 F.2d at 726.

79. *Id.* at 734.

80. *Id.*

81. *Id.*

82. *Asarco Inc.*, 1999 WL 33313132, at \*1.

*ern Pharmaceutical* in rejecting a mining corporation's claims that imposition of CERCLA liability for hazardous waste cleanup constituted a regulatory taking of its property.<sup>83</sup> Further, even though the district court concluded that a full takings analysis was not warranted in a CERCLA case, it applied CERCLA liability to the *Penn Central* test.<sup>84</sup> The court determined that the mining corporation's liability under CERCLA did not constitute a regulatory taking because the economic impact of the liability was not severe, and it did not interfere with investment backed expectations when it was imposed on the parties responsible for the contamination.<sup>85</sup> In addition, the court reasoned that the nature of the government action involved a valid regulation for the protection of public health and safety.<sup>86</sup> Therefore, liability under CERCLA withstood constitutional attack under the Takings Clause, in large part because liability under CERCLA is directed at those who created the need for the environmental cleanup.<sup>87</sup>

Not long after CERCLA was enacted, states began adopting similar legislation to deal with the threat of hazardous waste contamination.<sup>88</sup> In

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83. *Id.* at \*6-7.

84. *Id.*

85. *Id.* at \*7.

86. *Id.*

87. *See id.* at \*6-7. The court also rejected the mining company's contention that the economic impact of CERCLA was severe because other hazardous waste contributors could have contributed to the contamination on the grounds that CERCLA provides a property owner designated as a liable party under CERCLA with "a right of contribution." *Id.* at \*7. This would allow the property owner to seek compensation from the other hazardous waste contributors. *Id.*

88. *See* Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA), CAL. HEALTH & SAFETY CODE §§ 25300-01 (West 2006) (enacted in 1981, repealed and added in 1999, the HSAA is considered to be the California "state[] counterpart to CERCLA." *City of Lodi v. Randtron*, 13 Cal. Rptr. 3d 107, 115 (Cal. Ct. App. 2004)); Industrial Site Recovery Act, N.J. STAT. ANN. §§ 13:1k-6 to -35 (West 2003) (enacted in 1983, also known as the Environmental Cleanup and Responsibility Act); Solid Waste Disposal Act (SWDA), TEX. HEALTH & SAFETY CODE ANN. §§ 361.001-.912 (Vernon 2001 & Supp. 2006) (enacted in 1969, amended in 1981 and 1991); Model Toxics Control Act, WASH. REV. CODE ANN. §§ 70.105D.010-.921 (West 2002 & Supp. 2006) (enacted in 1988). Nearly all fifty states have adopted legislation similar to CERCLA, either having adopted it prior to CERCLA or in response to CERCLA. *Tod I. Zuckerman et al., Representing Buyers, Sellers, and Lenders in Transferring Contaminated Property: A Primer for Real Estate Practitioners Part I*, 35 REAL PROP. PROB. & TR. J. 305, 319-22 (2000); *see also* William D. Turkula, *Determining Cleanup Standards for Hazardous Waste Sites*, 135 MIL. L. REV. 167, 171 (1992); Quinn Scallon, Comment, *Hazardous Waste: Liability of Predecessors in Title*, 29 SAN DIEGO L. REV. 93, 101 (1992). These individual state statutes vary in their similarity to CERCLA, but liability under the state statutes must be at least as "stringent" as CERCLA to avoid federal preemption. *Zuckerman et al., supra*, at 319-22 ("Nothing in this chapter shall be construed or interpreted as preempting any State from imposing any *additional* liability or requirements with respect to the release of hazardous substances within such State." (quoting 42 U.S.C. § 9614(a) (1994))) (emphasis added).

1988, Washington State enacted its own hazardous waste removal legislation drafted in the image of CERCLA,<sup>89</sup> the Model Toxics Control Act (MTCA).<sup>90</sup> The MTCA created procedural provisions similar to CERCLA in terms of cleaning up toxic waste.<sup>91</sup> Under the MTCA, the state government identifies hazardous waste sites and either requires current property owners to clean up the waste, or the government cleans up the waste and seeks reimbursement from the parties it determines to be responsible.<sup>92</sup> Property owners who fall within the scope of the MTCA are held strictly liable for costs associated with cleanup.<sup>93</sup>

The MTCA, like CERCLA, has been able to withstand constitutional challenge<sup>94</sup> by those who have been designated by the Washington State government as "potentially liable persons" for payment of cleanup costs.<sup>95</sup> *Asarco Inc. v. Department of Ecology*<sup>96</sup> involved a case brought by an owner of commercial property against the Washington Department of Ecology for a declaration that the MTCA as applied to the property owner was unconstitutional.<sup>97</sup> The Washington Supreme Court determined that the property owner's constitutional claims were not ripe, and thus the case was not justiciable.<sup>98</sup> In making this determination, the court reviewed the analysis of the property owner's claim that the MTCA

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89. *Asarco Inc. v. Dep't of Ecology*, 43 P.3d 471, 472 (Wash. 2002) ("MTCA was modeled on CERCLA . . . [therefore] CERCLA case law [is] persuasive in interpreting MTCA."); *City of Seattle (Seattle City Light) v. Wash. State Dep't of Transp.*, 989 P.2d 1164, 1168 (Wash. Ct. App. 1999); *see also Burlington N. R.R. v. Time Oil Co.*, 738 F. Supp. 1339, 1343 (W.D. Wash. 1990) (order denying defendant's summary judgment motion) (analyzing MTCA "language identical in substance to CERCLA's . . . provision[s]"); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 15 P.3d 115, 120 (Wash. 2001) (outlining statutory requirements for CERCLA and MTCA).

90. WASH. REV. CODE ANN. §§ 70.105D.010-.910.

91. *See Asarco Inc.*, 43 P.3d at 472.

92. *See* WASH. REV. CODE ANN. § 70.105D.020(12) (defining "owner or operator" of property in question); *id.* § 70.105D.020(16) (defining "potentially liable person" as a person found liable by "credible evidence" under 70.105D.040); *id.* §§ 70.105D.030-.050 (outlining government's jurisdiction for investigation, cleanup, and enforcement and the property owner's liability); *Asarco Inc.*, 43 P.3d at 472.

93. WASH. REV. CODE ANN. § 70.105D.040(2) ("Each person who is liable under this section is strictly liable, jointly and severally, for all remedial action costs and for all natural resource damages resulting from the releases or threatened releases of hazardous substances. The attorney general, at the request of the department, is empowered to recover all costs and damages from persons liable therefor."); *Asarco Inc.*, 43 P.3d at 472.

94. The MTCA has also been construed to avoid constitutional challenges. *See Car Wash Enters., Inc. v. Kampanos*, 874 P.2d 868, 872-73 & n.4 (Wash. Ct. App. 1994) (construing MTCA to avoid conflict with Contracts Clause in the United States Constitution, Article I, Section 10, and the Washington State Constitution, article I, section 23, by allowing parties who foresee potential MTCA liability to allocate liability by private contract).

95. *See generally Asarco Inc.*, 43 P.3d at 472-77.

96. *Id.* at 471.

97. *Id.* at 474.

98. *Id.* at 477.

violated the Takings Clause by reviewing the factors of the *Penn Central* test.<sup>99</sup> The court asserted that it could not apply this test because the economic impact on the property owner and the extent of interference with “investment-backed expectations” were not known without the Department of Ecology having filed an enforcement or contribution action under the MTCA.<sup>100</sup> Because the takings analysis was already foreclosed by the majority’s narrow interpretation of the court’s ability to review the property owner’s takings claim, the MTCA survived constitutional challenge.<sup>101</sup>

### C. State Regulation of Methamphetamine Decontamination

Just as CERCLA and its state counterparts were enacted in response to growing concern over the dangers and extent of the problem of hazardous waste contamination,<sup>102</sup> methamphetamine cleanup statutes have

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99. *Id.* at 476. The court in *Asarco* did not cite *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) for this test. Instead, it attributed the language to *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1986), but *Connolly* itself quotes from *Penn Central*. See *Connolly*, 475 U.S. at 225; *Asarco Inc.*, 43 P.3d at 476.

100. *Asarco Inc.*, 43 P.3d at 476.

101. See *id.* at 481 (Sanders, J., dissenting). In a lengthy dissent of the majority’s opinion in *Asarco*, Judge Sanders agreed with the trial court’s ruling that the challenge to the MTCA was ripe for review and that the MTCA violated the Takings and Due Process Clauses. *Id.* at 477. In his analysis of the Takings Clause, Sanders argued that the majority narrowly applied a ripeness review to a takings challenge because ripeness review should only be applicable to regulations imposing “use restrictions,” not regulations imposing a “direct imposition of monetary liability.” *Id.* at 482-83 (demonstrating that even if ripeness were an issue, an enforcement action should not be the measure of ripeness, but rather ripeness should be determined by the fact that the status of the property owner had already been affected by the MTCA when the Department of Ecology named the company as a “potentially liable person”). After dividing the types of takings into two prongs of analysis, one where the government ““does not advance legitimate state interests”” and the other where the government denies ““an owner [of] economically viable use of his land,”” Sanders analyzed the property owner’s takings claim within the “legitimate state interests” prong. *Id.* at 484 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). This was because the property owner asserted that the regulation was “not constitutionally permissible at all, even with compensation.” *Id.* Judge Sanders agreed with the trial court in its disposition of the property owner’s “claims [that] remediation of th[e] site affords an affirmative public benefit, and should not prompt a burden . . . to be uniquely imposed on [the property owner’s] shoulders.” *Id.* 484-88. Among other reasons, Sanders noted the potential \$78,000,000 cost of cleanup and the fact that the property owner was required “to pay 100 percent of the cost to cure a problem for which it was at most 30 percent responsible” as evidence that a regulatory taking existed. *Id.* at 485-87.

Even if the majority had followed Sanders’ analysis in *Asarco Inc.*, the conclusion that application of the MTCA effected a regulatory taking would not have been good law insofar as it was based on application of the “legitimate state interests” test. The Supreme Court recently ruled that the “legitimate state interests” test is inappropriate for analysis of a regulatory takings claim. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005).

102. See H.R. REP. NO. 96-1016, pt. 1, at 18-21 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6120-23 (citing concern for dangerous conditions caused by present and future haz-

been enacted in response to growing concern over the dangers and extent of the problem of hazardous waste contamination caused by the manufacture of methamphetamine.<sup>103</sup> State methamphetamine statutes range from imposing a requirement on property owners to clean up the affected property and to disclose the history of its contamination,<sup>104</sup> to solely imposing a disclosure requirement.<sup>105</sup> Some states create guidelines, which allow for voluntary cleanup of the affected property.<sup>106</sup> Variation exists in the approach that each state takes to combat the hazardous residue left

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ardous waste sites); CAL. HEALTH & SAFETY CODE § 25301 (West 2006) (stating a purpose to regulate hazardous waste disposal and compensate persons injured by exposure to hazardous waste); N.J. STAT. ANN. § 13:1k-7 (West 2003) (“[D]ue to the growing public awareness and concern of the risks to the public health and the environment and the potential costs to the State to clean up abandoned contaminated sites, the ‘Environmental Cleanup and Responsibility Act’ was enacted.”); TEX. HEALTH & SAFETY CODE ANN. § 361.002 (Vernon 2001) (stating a purpose to protect public health, welfare, and property by controlling hazardous waste); WASH. REV. CODE ANN. § 70.105D.010 (West Supp. 2006) (declaring that public health and the environment are threatened by hazardous waste contamination).

103. See MONT. CODE ANN. § 75-10-1301 (2005) (citing concern for harm to the public caused by exposure to toxic methamphetamine residue); WASH. REV. CODE ANN. § 64.44.005 (West 2005) (same); W. VA. CODE ANN. § 60A-10-2 (LexisNexis 2005) (recognizing the expansion of the methamphetamine problem in the United States and in West Virginia and the injury to the public that methamphetamine use and manufacture causes).

104. See, e.g., ARIZ. REV. STAT. ANN. § 12-990, 12-1000 (2003 & Supp. 2005); COLO. REV. STAT. § 25-18.5-102 to -103 (2005); N.C. GEN. STAT. ANN. § 130A-284 (West 2005) (enabling act for administrative code provision 10A N.C. ADMIN. CODE 41D.0101 (2005)); TENN. CODE ANN. § 68-212-501 to -509; WASH. REV. CODE ANN. § 64.44.005-.901 (West, Westlaw through 2006 legislation).

105. See, e.g., MO. ANN. STAT. § 441.236 (Supp. 2006); MONT. CODE ANN. § 75-10-1301 to -1306 (establishing voluntary cleanup guidelines, but rules for the certification of contractors and a requirement that the owner notify a subsequent occupant or purchaser of the property’s history as a methamphetamine laboratory); OKLA. STAT. ANN. tit. 60, § 833(A)(2), (B)(1)(h) (West Supp. 2006) (stating that one of the allowable disclosure requirements is a form including a statement of the “existence of prior manufacturing of methamphetamine”); S.D. CODIFIED LAWS § 43-4-44 (1997 & LexisNexis 2006) (providing mandatory form for disclosure of property conditions prior to transfer in Part IV, “Hazardous Conditions,” and requiring disclosure of methamphetamine production and an explanation of the condition).

106. See, e.g., ARK. CODE ANN. § 20-7-132 (2005) (enabling act for the Arkansas Department of Health to create voluntary cleanup guidelines); MONT. CODE ANN. § 75-10-1301 to -1306. (establishing voluntary cleanup guidelines, which contain rules for the certification of contractors and contain a requirement that the owner notify a subsequent occupant or purchaser of the property’s history as a methamphetamine laboratory); see also IOWA BUREAU OF TOXICOLOGY, DEP’T OF PUB. HEALTH, GUIDELINES FOR CLEANING UP FORMER METHAMPHETAMINE LABS 1, [www.idph.state.ia.us/eh/common/pdf/hseess/meth\\_lab\\_cleanup.pdf](http://www.idph.state.ia.us/eh/common/pdf/hseess/meth_lab_cleanup.pdf) (last visited Sept. 7, 2006) (“The Iowa Department of Public Health, Bureau of Toxicology, has created these basic guidelines to assist public health officials, property owners and the general public in cleaning up former meth lab properties” in response to a finding that over 1100 methamphetamine contaminated properties had been discovered in Iowa in 2003).

behind after a methamphetamine laboratory is discovered, thus this Comment will focus on a few states as examples.

### 1. Washington

Washington's statutory scheme for the decontamination of residential properties used as methamphetamine laboratories is codified separately with respect to Washington's CERCLA counterpart, the MTCA.<sup>107</sup> Washington was one of the first states to enact a statute to deal with the problems associated with methamphetamine contamination.<sup>108</sup> Under Washington's statute, enforcement commences when law enforcement officers discover contaminated property and notify the local health officer, or when a property owner suspects contamination and notifies the local health officer.<sup>109</sup> Upon notification, the local health officer inspects the property and makes a determination as to the extent of the contamination, and the city or county determines whether the property requires cleaning, or in some cases, condemnation or demolition.<sup>110</sup> The property owner is afforded notice of the local health officer's determination and given a limited period in which to appeal.<sup>111</sup> However, notice is given only after the determination has been made.<sup>112</sup> In addition, if cleanup is deemed to be required by the local health officer, the property owner

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107. See WASH. REV. CODE ANN. §§ 64.44.005-.901.

108. See Russell, *supra* note 9. Washington was one of the first states to enact this type of legislation, most likely because of the fact that addiction to the drug began, in large part, on the West Coast and expanded across the country. See Cazenavette Statement, *supra* note 19, at 12.

109. See WASH. REV. CODE ANN. § 64.44.020.

110. *Id.* §§ 64.44.020-.040. For an example of the procedure in practice, see *Cagle v. King County*, 70 F. App'x 450, 451-52 (9th Cir. 2003).

111. See WASH. REV. CODE ANN. § 64.44.030(1). As to the timing of the hearing and appeal process, the statute provides in relevant part:

The [property owner's] request for a hearing must be made within ten days of serving the order. The hearing shall then be held within not less than twenty days nor more than thirty days after the serving of the order. . . . The owner or any person having an interest in the property may file an appeal on any order issued by the local health board or officer within thirty days from the date of service of the order with the appeals commission . . . .

*Id.*; see also *Cagle*, 70 F. App'x at 453 (describing timing of appeal).

112. See, e.g., WASH. REV. CODE ANN. § 64.44.030(1). As to the timing of the inspection and notice, the statute provides in relevant part:

If after the inspection of the property, the local health officer finds that it is contaminated . . . . [t]he local health officer shall cause the order to be served either personally or by certified mail, with return receipt requested, upon all occupants and persons having any interest therein as shown upon the records of the auditor's office of the county in which such property is located.

*Id.*; see also *Cagle*, 70 F. App'x at 452-53.

must use an environmental decontamination contractor certified by the state to perform the methamphetamine decontamination.<sup>113</sup>

The statute does not explicitly require payment for decontamination on the part of the property owner.<sup>114</sup> Instead, the language of the statute indicates that the property owner is required to pay for the cost of decontamination because use of the property<sup>115</sup> is conditioned on the property owner proving decontamination.<sup>116</sup> Any payments received from a property owner compensating the local health officer for requesting an inspection of his property<sup>117</sup> or from a decontamination contractor compensating the local health officer for issuance of its certificate<sup>118</sup> are collected in an account to fund the department of health's enforcement of the statute.<sup>119</sup>

*Cagle v. King County*<sup>120</sup> is the only case so far that has interpreted Washington's methamphetamine statute on constitutional grounds.<sup>121</sup> The Ninth Circuit rejected the challenge to the statute, which alleged, among other things, that the statute denied a property owner her procedural due process right to a hearing before the local department of health

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113. WASH. REV. CODE ANN. §§ 64.44.050-.060.

114. See generally *id.* §§ 64.44.005-.901 (failing to explicitly mention that the property owner is required to pay the cost of the cleanup).

115. See WASH. ADMIN. CODE 246-205-570(6)(a)-(b) (2005). Once the local health officer determines that a property needs to be decontaminated, an order is placed on the property prohibiting its use. See WASH. ADMIN. CODE 246-205-520(1)-(3) (promulgated pursuant to WASH. REV. CODE ANN. § 64.44.070).

116. See WASH. REV. CODE ANN. § 64.44.050(1). The language of section .050 appears to make it an option for property owners to have their property decontaminated, see *id.*, but in order to effectively participate in a hearing based on the status of their property, see *id.* § 64.44.030(1), or to effectively ensure that their property's decontaminated status is recorded in the real property records, see *id.*, decontamination is required. This is because "the property owner has the burden of showing that the property is decontaminated." *Id.* Montana's decontamination statute is similar to Washington's in that property transfer and requirements for reporting the fact that the property is a former methamphetamine lab are conditioned on decontamination. See MONT. CODE ANN. § 75-10-1305(1)-(2), -1306(1), -1306(3), -1306(5) (2005). Interestingly, Montana considers its decontamination statute "a voluntary program" despite these conditions on property use and disposition in the reporting requirements. See *id.* § 75-10-1301.

117. See WASH. REV. CODE ANN. § 64.44.020 (providing for fees to be charged to property owners who request inspection of their property when the property owners suspect it is contaminated).

118. See *id.* § 64.44.060(6) (providing for fees to be charged for contractor certificates).

119. See *id.* § 64.44.060(7) (providing for creation of a decontamination account).

120. 70 F. App'x 450 (9th Cir. 2003).

121. Based on the author's research as of October 24, 2006. As of this date, research has also failed to turn up any interpretation of a state's methamphetamine legislation on constitutional grounds.

quarantined the property.<sup>122</sup> The court upheld the constitutionality of Washington's methamphetamine statute.<sup>123</sup> The court based its decision on the fact that the statute was a valid exercise of the protection of public health and safety and the fact that the statute provided the owner with an opportunity for a hearing after the authorities quarantined the property.<sup>124</sup>

## 2. Tennessee

Tennessee's methamphetamine decontamination statute is similar to Washington's statute in that: (1) it prohibits use and habitation of property once contamination is discovered;<sup>125</sup> (2) it affords the property owner a method of appealing the determination;<sup>126</sup> (3) it does not explicitly require the property owner to decontaminate the property, but use of the property and removal from a quarantine list is conditioned on decontamination;<sup>127</sup> and (4) it requires the property owner to use an approved

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122. *Cagle*, 70 F. App'x at 452-53 (alleging violation of procedural due process rights by declaring her property "unfit for occupancy without the benefit of prior notice and hearing," in addition to improper prior inspection of the property).

123. *Id.* at 453.

124. *Id.* To make the determination, the court balanced the property owner's interests against those of the government and determined that the government's interest outweighed those of the property owner. The court applied the test in *Mathews v. Eldridge*, 424 U.S. 319 (1976), which requires a balancing of the property owner's interest that is allegedly deprived as a result of the government's action against the interests of the government. See *Cagle*, 70 F. App'x at 452 (citing *Mathews*, 424 U.S. at 335). If the process requested by the property owner would be "impractical[]," *id.* (quoting *Parratt v. Taylor*, 451 U.S. 527, 539 (1981)), for the government to provide, or when balanced against the interests of the property owner the government's interests are weightier, the property owner's due process argument is likely to fail. *Id.*

After applying this balancing test to the case at bar, the Ninth Circuit noted that: (1) even though the property owner was not entitled to a hearing before her property was posted, she was entitled to a hearing within twenty to thirty days after the posting; (2) Washington State (and therefore King County) had a compelling regulatory purpose in protecting the public health and safety from the risks of methamphetamine contamination; and (3) Washington State's interest was equal in weight to the government's interest in other cases upholding statutes against due process challenges. *Id.* at 453. Interestingly, none of the precedent cited by the court for upholding regulations against due process challenges dealt with due process claims arising from deprivation of real property. See *id.* (describing cases dealing with deprivation of "unwholesome food," a "misbranded" machine," and a petroleum permit).

125. See TENN. CODE ANN. § 68-212-503(a)-(b) (Supp. 2005) (stating that local law enforcement may quarantine the affected property in order to prevent injury to the public from exposure to methamphetamine contamination).

126. See *id.* § 68-212-503(c)(1)-(2) ("Any person who has an interest in property quarantined pursuant to this section may file a petition in the [relevant] . . . court of the county in which the property is located." The court makes a determination to lift or deny the quarantine based on the court's review of the interested person's offer of proof.).

127. See *id.* §§ 68-212-503(c)-(d), -505, -507(b) (providing no explicit mention of a cleanup requirement, but listing the property owner's showing of proper decontamination



or certified contractor to perform the decontamination if the property owner chooses to decontaminate the property.<sup>128</sup> Like the Washington statute, the Tennessee statute provides compensation to the government only for enforcement of the provisions of the statute.<sup>129</sup> Under the section entitled "Restitution," costs associated with inspection, testing, and quarantine are covered by a criminal statute that requires certain persons convicted of a drug-related felony, including methamphetamine convictions, to make restitution to government entities for the costs of mitigating any damage or dangerous conditions resulting from the crime.<sup>130</sup> The source of restitution is the one major difference between Tennessee's and Washington's methamphetamine contamination statute: government entities enforcing the Washington statute receive reimbursement generated from enforcement of the decontamination statute itself, whereas government entities enforcing the Tennessee statute receive reimbursement from enforcement of Tennessee's criminal laws.<sup>131</sup>

### 3. *Arizona and Colorado*

The respective methamphetamine decontamination statutes in Arizona and Colorado are more specific regarding placement of the burden of methamphetamine decontamination on property owners.<sup>132</sup> Unlike Washington's or Tennessee's statutes, which place requirements on a property owner "who desires to have the property decontaminated,"<sup>133</sup> yet conditions use of the property on decontamination,<sup>134</sup> the Arizona and

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by a qualified firm as one of two reasons provided for which a quarantine can be lifted—the other is to show that the quarantine was unwarranted in the first place, i.e., the property was not sufficiently contaminated to warrant the quarantine).

128. *See id.* § 68-212-505 ("The property must remain quarantined until a certified industrial hygienist or other person or entity named on the commissioner's list . . . certifies to the quarantining agency that the property is safe for human use.").

129. *See id.* § 68-212-506 (listing costs of "inspection, testing or quarantine" as covered by the calculation of restitution for a criminal drug violation; however, cleanup costs are not listed).

130. *Id.* § 39-17-417(c)(2)(B) (2003); *id.* § 68-212-506.

131. *See id.* §§ 39-17-417(c)(2)(B) (providing for calculation of restitution to the government for costs of cleaning property contaminated as a result of a criminal drug violation); *id.* § 68-212-506 (including restitution in methamphetamine cleanup statute for "inspection, testing or quarantine"); WASH. REV. CODE ANN. § 64.44.060(7) (West, Westlaw through 2006 legislation) (stating that fees collected through enforcement of methamphetamine statute will be used for continued enforcement and administration of statute).

132. *See* ARIZ. REV. STAT. ANN. § 12-1000(C) (2003 & Supp. 2005) ("The owner of the real property shall remediate the residually contaminated portion of the real property."); COLO. REV. STAT. § 25-18.5-103(1)(a) (2005) ("[T]he owner of any contaminated property shall meet the cleanup standards for property established by the board.").

133. WASH. REV. CODE ANN. § 64.44.050(1).

134. *See* TENN. CODE ANN. §§ 68-212-503(c)-(d), -505, -507(b); WASH. REV. CODE ANN. § 64.44.030(1); WASH ADMIN. CODE 246-205-520(1)-(3) (2005).

Colorado statutes use more assertive language.<sup>135</sup> The Arizona statute mandates that the property owner "shall remediate the residually contaminated portion of the real property."<sup>136</sup> The Colorado statute mandates that the property owner "shall meet the cleanup standards for property . . . [or] elect instead to demolish the contaminated property."<sup>137</sup>

Further, Arizona's statute is more stringent than other state statutes by requiring the owner to decontaminate the property within a specified time limit.<sup>138</sup> Arizona requires decontamination of the affected property "within twelve months after the date of notice of removal."<sup>139</sup> This time limit begins to run as soon as the methamphetamine laboratory is discovered by law enforcement.<sup>140</sup> If a property owner fails to comply with the Arizona time limit, he does not escape liability for cleanup costs.<sup>141</sup> The Arizona statute provides for the cleanup to be conducted by the government, and afterward the state receives reimbursement by placing a lien on the property.<sup>142</sup>

#### 4. Arkansas

Rather than requiring methamphetamine property cleanup as other state statutes require, the Arkansas methamphetamine statute provides for voluntary cleanup and establishes decontamination guidelines for law

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135. See ARIZ. REV. STAT. ANN. § 12-1000(C) ("shall"); COLO. REV. STAT. § 25-18.5-103(1)(a) ("shall").

136. ARIZ. REV. STAT. ANN. § 12-1000(C).

137. COLO. REV. STAT. § 25-18.5-103(1)(a).

138. ARIZ. REV. STAT. ANN. § 12-1000(C).

139. *Id.* The notice of removal is the document issued by law enforcement notifying the property owner of the discovery of contamination. See ARIZ. REV. STAT. ANN. § 12-1000(A)(1) ("At the time of the discovery or arrest, [a law enforcement officer] shall deliver a copy of the notice of removal . . . to the owner of the real property."). Colorado requires decontamination of any affected personal property within "ten days after the date of discovery of the laboratory or contamination," COLO. REV. STAT. § 25-18.5-103(1)(b), but does not place a time limit on decontamination of real property. See generally *id.* § 25-18.5-103(1)(a)-(b) (failing to list a time limit for real property in the section establishing a property owner's liability for the cleanup).

140. See ARIZ. REV. STAT. ANN. § 12-1000(A)-(C). The cleanup and notice portion of Arizona's statute is apparently triggered by discovery of the methamphetamine laboratory by law enforcement because it does not provide for what happens when a property owner discovers the contamination. See generally *id.* The twelve month time period for decontamination begins to run "after the date of notice of removal," *id.* § 12-1000(C), yet under statute, the notice of removal is issued by law enforcement upon discovery of the methamphetamine laboratory. See *id.* § 12-1000(A)-(B) ("If a peace officer discovers a clandestine drug laboratory or arrests a person . . . the peace officer: [a]t the time of the discovery or arrest, shall deliver a copy of the notice of removal pursuant to subsection B of this section . . .").

141. See ARIZ. REV. STAT. ANN. § 12-1000(C) (noting that Arizona may later recover costs from property owner by attaching a lien).

142. *Id.*

enforcement officers and the general public.<sup>143</sup> The statute also establishes that the guidelines “be reviewed and updated annually,”<sup>144</sup> and revisions were recently made in 2006.<sup>145</sup> After law enforcement has conducted a “primary cleanup” of visible chemicals and manufacturing materials upon discovery of the methamphetamine laboratory in a criminal investigation, the guidelines provide for a “secondary cleanup.”<sup>146</sup> Even though the Arizona Department of Health and Human Services asserts that the responsibility of secondary cleanup falls on the owner of the contaminated property, the Department of Health emphasizes that its guidelines do not have the force of law to require cleanup.<sup>147</sup> Because of the current inability to enforce methamphetamine cleanup in Arkansas, for those property owners who choose to clean up their contaminated property, they are (for the most part) on their own to find a reputable and effective environmental remediation firm and to ensure that their property has been decontaminated within known, safe limits.<sup>148</sup>

## II. APPLICATION OF METHAMPHETAMINE DECONTAMINATION STATUTES COULD AMOUNT TO A REGULATORY TAKING

State legislatures acknowledge that the purpose of their methamphetamine statutes is to protect “[i]nnocent members of the public” from “harm[] when they are unknowingly exposed to [methamphetamine] residues if the properties are not decontaminated prior to any subsequent rental, sale, or use of the properties.”<sup>149</sup> The statutes fall under each state’s general police power to protect public health, safety, and wel-

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143. ARK. CODE ANN. § 20-7-132(a)-(b) (2005); *see also* ARK. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 25, at 2 (referencing authority for creation of guidelines as Arkansas Code Annotated section 20-7-132 (effective July 16, 2003)); IOWA BUREAU OF TOXICOLOGY, *supra* note 106, at 1.

144. ARK. CODE ANN. § 20-7-132(c); *see also* ARK. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 25, at 2 (referencing requirement to review and make revisions at least once a year).

145. ARK. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 25, at 2.

146. *Id.* at 1-2.

147. *Id.* Stating in the purpose section of the guidelines:

At this time, there are no state statutes that specifically authorize state or local entities to require the cleanup of the interior of privately owned properties contaminated by clandestine methamphetamine manufacturing activities. . . . The information contained in this document should to be [sic] used as guidelines and are not regulations or rules subject to enforcement.

*Id.*

148. *See id.* at 3, 5, 7-8.

149. MONT. CODE ANN. § 75-10-1301 (2005); *see also* WASH. REV. CODE ANN. § 64.44.005 (West 2005) (“Innocent members of the public may be harmed by the residue left by these chemicals when the properties are subsequently rented or sold without having been decontaminated.”).

fare.<sup>150</sup> However, “innocent members of the public” include innocent property owners who either unknowingly purchase property that has a history of use as a methamphetamine laboratory<sup>151</sup> or who own property and are unaware of its current use as a methamphetamine laboratory, and are subsequently harmed by having to pay decontamination costs.<sup>152</sup> These legislatures fail to protect current innocent property owners in the interest of protecting future innocent property owners from the harm caused by unknowingly purchasing a former methamphetamine laboratory.<sup>153</sup> The property owners who are excluded from protection may have an “as applied” takings claim against their respective state governments.<sup>154</sup>

#### A. The Property Owner Pays: The Requirements Approach

Although Washington and Tennessee do not explicitly state that a property owner must clean up his property to comply with the Washington and Tennessee statutes,<sup>155</sup> they are the same as Arizona’s and Colo-

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150. See, e.g., MONT. CODE ANN. § 75-10-1301 (“The purpose of this part is to protect the public health, safety, and welfare . . .”).

151. See Jerome et al., *supra* note 1, at 52-54.

152. See *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1334 (Or. Ct. App. 1993) (noting that property owner incurred \$38,100 in damages after subtenant manufactured methamphetamine on property); *Graff v. Allstate Ins. Co.*, 54 P.3d 1266, 1267 (Wash. Ct. App. 2002) (finding that property owner incurred damages from cleaning up methamphetamine residue caused by tenant and possibly others “hiding in the house”); see also *Cagle v. King County*, 70 F. App’x 450, 451-53 (9th Cir. 2003) (describing a property owner who was prevented from access to her property when law enforcement uncovered a current methamphetamine manufacturing operation allegedly run by the property owner’s son). Although it may be disputed that the property owner in *Cagle* knew of the methamphetamine contamination because the suspected manufacturer was the property owner’s son, this was not at issue during review by the court in her due process challenge. See Answering Brief for Appellee at 4-6, *Cagle v. King County*, 70 F. App’x 450 (9th Cir. 2003) (No. 01-36119), 2002 WL 32146051. See generally *Cagle*, 70 F. App’x at 451-53 (failing to mention exact source of resulting methamphetamine contamination). The County hinted in its brief that the owner may have known about the contamination when the County stated that the owner’s son’s involvement was a factor in the local health officer’s determination to quarantine the property. See Answering Brief for Appellee, *supra*, at 5-6.

153. See, e.g., *Graff*, 54 P.3d at 1267. The legislature’s actions are not referenced here to imply that the legislature was not effecting a “legitimate state interest,” which would be an appropriate analysis in a due process inquiry into the methamphetamine statutes, see *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005) (noting that “legitimate state interests” test was adopted from the Supreme Court’s due process jurisprudence and later became a part of regulatory takings jurisprudence, but rejecting future use of the “legitimate state interests” test in a takings analysis), but rather to highlight a group of property owners who may have an “as applied” challenge to the methamphetamine statutes.

154. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 334 (2002) (noting that it is easier to develop facts for a regulatory takings claim in an “as applied” challenge than a facial challenge to a regulation).

155. See TENN. CODE ANN. § 68-212-505 (Supp. 2005); WASH. REV. CODE ANN. § 64.44.050(1) (West, Westlaw through 2006 legislation); *supra* notes 114-16, 127 (discussing

rado's because they require a property owner to clean up his property after methamphetamine contamination is discovered.<sup>156</sup> The issue, then, is whether the statutes that require the property owner to pay for the costs of cleanup could amount to a regulatory taking of the property owner's property. As the recent regulatory takings cases instruct, the *Penn Central* analysis is used to analyze regulatory takings claims in order to balance the interests of the property owner against the interests of the state.<sup>157</sup> A finding of a regulatory taking under the *Penn Central* analysis is dependent entirely on the facts that are presented to the court.<sup>158</sup>

### 1. A Possible "As Applied" Taking

In order to determine if a regulatory taking has occurred when these statutes are enforced, a court balances: (1) "[t]he economic impact of the regulation on the [property owner]"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) "the character of the governmental action."<sup>159</sup> The cost of methamphetamine cleanup, as discussed above, can run into the tens of thousands of dollars.<sup>160</sup> On top of this cost, the economic value of the property<sup>161</sup> and the economic value of its use (for example, by leasing the property to tenants<sup>162</sup> or by opening the property to paying guests as a hotel, motel, or bed and breakfast)<sup>163</sup> can add up to a significant cost to

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Washington's and Tennessee's statutory language and the relationship between the statutory disclosure and removal from quarantine provisions, and the requirement that the property owner prove that the property has been decontaminated).

156. Compare TENN. CODE ANN. § 68-212-505 (quarantine removed after property is cleaned), and WASH. REV. CODE ANN. § 64.44.050(1) (same), with ARIZ. REV. STAT. ANN. § 12-1000(C) (Supp. 2005) ("[Property owner] shall remediate the residually contaminated portion of the real property"), and COLO. REV. STAT. § 25-18.5-103 (2005) ("[Property owner] shall meet the cleanup standards for property established by the board" or "elect instead to demolish the contaminated property").

157. See *Lingle*, 544 U.S. at 538-39 ("Outside . . . narrow categories . . . regulatory takings challenges are governed by the standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978).") (internal citation omitted); *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 322, 335-36 (citing *Penn Central* for factual inquiry in regulatory takings case); *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) (referring to *Penn Central* as the "polestar" that "govern[s]" a regulatory takings case).

158. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123-24 (1978).

159. *Id.* at 124.

160. See Jerome et al., *supra* note 1, at 53.

161. For example, the Needhams purchased their house for \$169,000. *Id.* at 52. By the end of their methamphetamine ordeal they were nearly bankrupt. *Id.* at 53.

162. See *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1334 (Or. Ct. App. 1993) (finding the "loss of rental income" from cleaning up methamphetamine contaminated property totaled \$7200).

163. See Jerome et al., *supra* note 1, at 53 (indicating that the United States Drug Enforcement Administration reported that there were 4673 methamphetamine labs discovered in houses, 576 in apartments and condominiums, and 319 in hotels and motels). The

the property owner if use of the property is restricted when designated as a methamphetamine contamination site.<sup>164</sup> A court may also find that the methamphetamine statute interferes with a property owner's "distinct investment-backed expectations."<sup>165</sup> The courts in the CERCLA takings cases found that the statute did not interfere with investment backed expectations because the property owners were also the contributors of the hazardous waste and because the objective of CERCLA is to target the contributors of the hazardous waste.<sup>166</sup> The methamphetamine statutes are not so limited to target only the producer of the methamphetamine,<sup>167</sup> and therefore, this reasoning would be inapplicable in the case of an innocent property owner who had no connection with the methamphetamine contamination.

In addition, the landscape of the problem of methamphetamine contamination can be painted just as it was by Justice Holmes in *Pennsylvania Coal Co.* In *Pennsylvania Coal Co.*, Justice Holmes wrote, "[a] source of damage to [a single private] house is not a public nuisance even if similar damage is inflicted on others in different places. The damage is not common or public."<sup>168</sup> The Court further determined that private, contractual notice of the danger to the individual property owner was sufficient to warn the individual property owner of the harms the statute sought to prevent.<sup>169</sup> Although there may be "similar damage" from methamphetamine contamination "inflicted on others in different places," one can argue that "[t]he damage is not . . . public."<sup>170</sup> The damage is inflicted on several "single private" residential properties.<sup>171</sup> In

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cleanup costs can be greater for owners of larger buildings with multi-residential units because some statutes require cleanup well beyond the initial locus of the methamphetamine manufacture. See ARIZ. ADMIN. CODE § R4-30-305(B)(4) to (5) (2005) (providing an extensive list of items that must be cleaned and the manner in which they are to be cleaned for both "areas highly suggestive of contamination" and "areas not highly suggestive of contamination"); 10A N.C. ADMIN. CODE 41D.0102-.0103 (stating that assessment of property prior to decontamination includes ventilation systems that "serve[] more than one unit or structure such as motels, apartments, row houses or multiple-family dwellings to determine whether contamination entered other residences or rooms," which must then be cleaned according to the decontamination regulations).

164. See *supra* notes 162-63.

165. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

166. *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 733 (8th Cir. 1986); *United States v. Asarco Inc.*, No. CV 96-0122-N-EJL, 1999 WL 33313132, at \*7 (D. Idaho Sept. 30, 1999).

167. See *generally supra* notes 114-16, 127, 132-41 and accompanying text (stating that a property owner of a contaminated property is required to clean up his property once it has been designated as contaminated under the applicable methamphetamine statute).

168. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922).

169. *Id.* at 414.

170. See *Pa. Coal Co.*, 260 U.S. at 413.

171. See *id.*

addition, just as the mining contracts in *Pennsylvania Coal Co.* provided notice, the reporting provisions of these statutes provide notice to property owners entering into private contracts for the sale or purchase of land.<sup>172</sup> Given the similarities with *Pennsylvania Coal Co.* and the fact-based inquiry courts employ for regulatory takings inquiries, a court could find that these statutes, as applied to a property owner, amount to a regulatory taking.

## 2. Possibly Not an "As Applied" Taking

On the other hand, there is also a strong argument against finding that the methamphetamine regulations requiring cleanup would amount to a regulatory taking. This is because one of the *Penn Central* factors, "the character of the governmental action,"<sup>173</sup> weighs heavily in favor of the government in its regulation of methamphetamine contaminated properties. As discussed above, the methamphetamine "threat" is rapidly expanding across states, and exposure to methamphetamine contaminated properties presents a serious health risk to those who come in contact with the contamination.<sup>174</sup> Arizona, Colorado, Tennessee, and Washington enacted their methamphetamine statutes to serve the important purpose of protecting property and persons from the dangers resulting from methamphetamine manufacture.<sup>175</sup> With maybe the exception of *Pennsylvania Coal Co.*, the Supreme Court has refrained from evaluating the nature of a safety ordinance when deciding a regulatory takings case.<sup>176</sup> However, that is not to say that the status of a regulation as a safety ordinance is not significant in the regulatory takings analysis.<sup>177</sup> To the contrary, the Court in *First English Evangelical* remanded the case to the

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172. See ARIZ. REV. STAT. ANN. § 12-1000(F)(1)-(5) (2003); COLO. REV. STAT. § 25-18.5-103(2) to (3) (2005); TENN. CODE ANN. § 68-212-507 to -508 (Supp. 2005); WASH. REV. CODE ANN. § 64.44.030(1), .050(1) (West, Westlaw through 2006 legislation).

173. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

174. See *supra* notes 19-21, 28 and accompanying text.

175. See, e.g., WASH. REV. CODE ANN. § 64.44.005 (West 2005).

176. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 312-13 (1987); *Pa. Coal Co.*, 260 U.S. at 413-14. In *Pennsylvania Coal Co.*, the Court focused on the safety regulation and determined that it was not necessary to protect individual property owners in private contractual relationships for coal extraction from the dangers associated with subsidence of land. *Pa. Coal Co.*, 260 U.S. at 413-14. In *First English Evangelical*, the Court left the determination of the status of the regulation as a taking to the California courts and stated, "We . . . have no occasion to decide . . . whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations." *First English Evangelical*, 482 U.S. at 313; see also *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 328-29 (2002) (discussing disposition of *First English Evangelical*, that on remand the California court determined that the safety ordinance was not a regulatory taking).

177. See, e.g., *First English Evangelical*, 428 U.S. at 313.

California courts to determine if the safety ordinance amounted to a regulatory taking,<sup>178</sup> and on remand, the California court determined that a taking did not exist.<sup>179</sup> Additionally, the Ninth Circuit, in *Cagle v. King County*, placed weight on the fact that the methamphetamine statute at issue was designed to protect the health and safety of the public when the court determined that the statute did not violate a property owner's procedural due process rights.<sup>180</sup> Therefore, an argument can be made that because the methamphetamine statutes are safety ordinances, it will be difficult to find a violation of the Fifth or Fourteenth Amendments despite the significant costs to the property owner.

### B. The Property Owner's Choice: The Guidelines Approach

For states that employ Arkansas's approach to methamphetamine decontamination (creating a voluntary scheme where property owners choose to decontaminate their property and choose to follow the guidelines), there is obviously no regulatory takings issue because the guidelines do not have the force of law and are not considered regulations.<sup>181</sup> For property owners, this may seem like the best approach because there is no legal requirement to do anything about methamphetamine contamination.<sup>182</sup> However, where the other statutes are unbalanced in terms of their cleanup provisions,<sup>183</sup> the Arkansas cleanup guidelines arguably also create an imbalance in the law in terms of the notice provisions.<sup>184</sup> Just as there is no requirement to clean up property, there is no requirement for property owners to disclose the methamphetamine contamina-

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178. *Id.*

179. *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 907 (Cal. Ct. App. 1989); see also *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 328-29.

180. See *Cagle v. King County*, 70 F. App'x 450, 452-53 (9th Cir. 2003). Although the issue in *Cagle* was a due process challenge to Washington's methamphetamine statute, *id.* at 452, and the Supreme Court recently rejected using a due process analysis in a Takings Clause challenge, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 540 (2005), the nature of the governmental action is a factor that is balanced in both types of analysis. Compare *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978) (balancing "the character of the governmental action"), with *Cagle*, 70 F. App'x at 452 (balancing "the Government's interest, including the function involved") (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976))).

181. See ARK. CODE ANN. § 20-7-132 (2005); ARK. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 25, at 2.

182. See Rineheart, *supra* note 9 (discussing property owners expressing opinions against regulation requiring cleanup).

183. See *supra* Part II.A.1-2 (discussing regulatory takings issues with statutes following the requirements approach).

184. See Tracy, *supra* note 69, at 184-85 (acknowledging the importance of notice for property owners and future property owners when making decisions regarding the transfer of property).



tion to future parties interested in the property either, as is required in Arizona, Colorado, Tennessee, and Washington.<sup>185</sup> The Arkansas Department of Health and Human Services references the absence of a unified or centralized system for keeping track of properties used as methamphetamine laboratories.<sup>186</sup> When entering into a contract to purchase property, a buyer should have the benefit of full knowledge of the property's history, and the prospective purchaser should have the opportunity to accept or decline to purchase property once used as a methamphetamine laboratory.<sup>187</sup> While Arkansas refrains from requiring a property owner to clean up his property, the state should require property owners to disclose to future interested parties the fact that the property was once a methamphetamine laboratory and could be contaminated.<sup>188</sup> From a policy standpoint, the problem of "[i]nnocent members of the public" being "harmed when they are unknowingly exposed to [chemical methamphetamine residues]" is "frustrated by the lack of a" standard for discovering the criminal history of the property.<sup>189</sup>

### III. CERCLA AND MTCA DEFENSES SHOULD SERVE AS A MODEL FOR STATES

Even though the outcome of a takings challenge to a methamphetamine cleanup statute may be uncertain,<sup>190</sup> current protection for property owners recovering cleanup costs under the methamphetamine statutes is limited or impractical.<sup>191</sup> Unfortunately, protection based on insurance

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185. See ARIZ. REV. STAT. ANN. § 12-1000(F) (2003); COLO. REV. STAT. § 25-18.5-103(2) to (3), -104 to -105(2) (2005); TENN. CODE ANN. § 68-212-505, -507 (Supp. 2005); WASH. REV. CODE ANN. § 64.44.050(1) (West, Westlaw through 2006 legislation).

186. ARK. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 25, at 1-2.

187. See Tracy, *supra* note 69, at 172-73 (addressing the problem that the lack of standards for reporting contaminated land poses to prospective purchasers and recommending "that legislatures . . . impose an affirmative duty on the seller to disclose information about contaminated land to the buyer").

188. See *id.* at 172-73, 224.

189. MONT. CODE ANN. § 75-10-1301 (2005) (expressing legislative concern over "lack of a decontamination standard," not a reporting standard, but the problems are intertwined); Tracy, *supra* note 69, at 172-73, 224. It is in the best interest of states and property owners to ensure that some sort of notice is required to combat the spread of methamphetamine by exposing these dangerous "clandestine" laboratories. See *supra* notes 23-29 and accompanying text (describing clandestine nature of laboratories and potentially harmful health effects).

190. See *supra* Part I.A.

191. See, e.g., COLO. REV. STAT. § 25-18.5-103(2) (2005) (excluding methamphetamine manufacturers from the provision that releases property owners from civil liability once their property has been decontaminated). The particular liability from which the property owner is released is liability arising from alleged bodily injury due to the presence of hazardous chemical residues from the former methamphetamine laboratory. *Id.* However, the language that excludes methamphetamine manufacturers from this same immunity to "health-based civil actions" does not specifically mention the type of liability, so presuma-

coverage is limited by individual insurance policies.<sup>192</sup> However, an effec-

by a property owner might choose to sue the methamphetamine manufacturer for chemical cleanup. *See generally id.* Montana's methamphetamine statute contains a similar provision, but the language in Montana's statute excludes a manufacturer of methamphetamine from immunity for civil liability "in any action . . . based on the presence of methamphetamine in an inhabitable property." MONT. CODE ANN. § 75-10-1305(4) to (5) (2005).

The Texas legislature went a step further than Colorado in defining the civil liability of a methamphetamine manufacturer when it enacted its methamphetamine statute, creating strict liability for the manufacture of methamphetamine. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 99.002-.003 (Vernon 2005 & Supp. 2006). The liability specifically covers "any exposure by an individual to the manufacturing process, including exposure to the methamphetamine itself or any of the byproducts or waste products incident to the manufacture," *id.* § 99.003, calculated by either: "(1) actual damages for personal injury, death, or property damage as a result of the exposure; or (2) \$20,000 for each incident of exposure," *id.*, whichever amount is greater. *Id.* Therefore, in Texas, a property owner can bring a claim against the methamphetamine manufacturer who caused the contamination on the owner's property and recover the costs of cleanup. However, the methamphetamine manufacturer may be judgment proof, so it is likely impractical to sue the methamphetamine manufacturer under any theory of liability because a property owner is not likely to receive any monetary damages that may be awarded. *See generally* Clinton W. Taylor, Comment, *The Oklahoma Drug Dealer Liability Act: A Civil Remedy for a "Victimless" Crime*, 52 OKLA. L. REV. 227, 228, 233 (1999) (describing a trend in legislatures to allow a victim who has been injured by a drug related crime to bring civil tort proceedings against the criminal defendant and the difficulty victims have finding a criminal defendant with deep pockets (or a statutory prohibition to sue anyone other than a judgment proof "retail level" dealer)).

192. *See, e.g.,* Graff v. Allstate Ins. Co., 54 P.3d 1266, 1268 (discussing method of insurance policy interpretation) (Wash. Ct. App. 2002). Prior to the time that methamphetamine laboratory contamination really became an issue in the United States, courts interpreted insurance policies in a manner that allowed the policy holder to recover costs of damage to the property resulting from a third party's illegal use of the property. *See, e.g.,* Livaditis v. Am. Cas. Co., 160 S.E.2d 449, 450-51 (Ga. Ct. App. 1968) (finding manufacture of moonshine an illegal use of property). In *Livaditis v. American Casualty Co.*, the Court of Appeals of Georgia found that damage resulting from a third party's manufacture of moonshine, which created smoke and mold stains on walls and carpets, did not preclude a property owner from recovering under the "vandalism" provision of his insurance policy. *Id.* at 450-53 (holding, however, that the property owner was ultimately barred from recovery under the policy because the property owner did not meet the twelve month requirement for filing a claim for the loss). For a recent case interpreting *Livaditis* and dealing with illegal activity other than methamphetamine manufacture, see *Bowers v. Farmers Ins. Exchange*, 991 P.2d 734, 735, 737-38 (Wash. Ct. App. 2000) (holding that mold damage from third party's manufacture of marijuana was covered under the "vandalism" provision even though policy explicitly excluded recovery for mold damage).

In recent cases dealing with claims by policy holders for recovery from damage resulting from methamphetamine manufacture, courts have likewise attempted to fit the type of damage within provisions of the policy to allow property owners to recover from their insurance company. *See* *Farmers Ins. Co. v. Trutanich*, 858 P.2d 1332, 1334-36, 1338-39 (Or. Ct. App. 1993) (holding methamphetamine contamination by a third party operating a methamphetamine lab did not bar the policy holder from recovery under the insurance policy because methamphetamine "odor" and smoke damaged the house; policy holder recovered \$38,000 for the cost of cleaning up the damage from the manufacture of methamphetamine because even though the policy excluded recovery for "contamination,"

tive and alternative means of protection can be found in the current federal and state statutes that regulate decontamination of hazardous waste in general—CERCLA and its state counterparts.<sup>193</sup> CERCLA (and Washington's MTCA, for example)<sup>194</sup> provides a complete defense to liability for cleaning up hazardous waste when a property owner was unaware of the contamination prior to ownership of the property and did not contribute to the contamination.<sup>195</sup> The following proposed language

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damage from the methamphetamine vapors was separate from the contamination damage); *Graff*, 54 P.3d at 1268-70 (resulting contamination from a third party's operation of a methamphetamine laboratory was covered under the "vandalism" provision of the insurance policy over the insurance company's claims that recovery should be barred because the damage to the property was not visible and the policy excluded coverage of contamination). Therefore, it is possible to recover costs of decontaminating a former methamphetamine laboratory from an insurance policy, but recovery depends on the nature of the damage and the particular provisions of the insurance policy. See *Graff*, 54 P.3d at 1268 (interpreting the coverage of an insurance policy so that "effect [is given] to each of [the policy's] provisions" and "the court characterizes the peril causing the loss"). The property owner is therefore limited to the provisions of his insurance policy and the court's characterization of the methamphetamine damage, see *id.* at 1268-69, although these cases suggest that a property owner in Washington or Oregon may be able to recover if he can convince the court that the damage was caused by "vandalism" or "vapors." See *Farmers Ins. Co.*, 858 P.2d at 1336 (vapors); *Graff*, 54 P.3d at 1268-70 (vandalism).

193. See 42 U.S.C. §§ 9601(35), 9607(b)(3) (2000 & Supp. III 2003) (third party defense to liability for hazardous waste contamination); WASH. REV. CODE ANN. § 70.105D.040(3) (West 2002) (third party defense to liability for hazardous waste contamination).

194. Another source of an innocent owner defense can be found in state criminal and civil forfeiture laws. See KAN. STAT. ANN. § 60-4106(a)(3) (2004) ("No property is subject to forfeiture under this act if the owner or interest holder acquired the property before or during the conduct giving rise to the property's forfeiture, and such owner or interest holder: (A) Did not know and could not have reasonably known of the act or omission or that it was likely to occur; or (B) acted reasonably to prevent the conduct giving rise to forfeiture."); OHIO REV. CODE ANN. § 2933.43(C) (LexisNexis 2006) ("No property shall be forfeited pursuant to this division if the owner of the property establishes, by a preponderance of the evidence, that the owner neither knew, nor should have known after a reasonable inquiry, that the property was used, or was likely to be used, in a crime or administrative violation."); TEX. CODE CRIM. PROC. ANN. art. 59.02(c)(1) (Vernon Supp. 2005) (stating that an owner must prove by preponderance of the evidence that he acquired interest in the property before or during the "act or omission giving rise to forfeiture," or in the case of real property, also "did not know or should not reasonably have known of the act or omission giving rise to the forfeiture"); WASH. REV. CODE ANN. § 69.50.505(1)(h) (West Supp. 2006) (stating that property tied to distribution or manufacture of controlled substances is subject to forfeiture unless the owner of the property did not consent to the controlled substance violation or the offense was committed without the property owner's knowledge).

195. For the defense in CERCLA, see 42 U.S.C. §§ 9601(35), 9607(b)(3). Section 9607(b)(3) provides in relevant part:

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . . (3) an act or omission of a third party . . .

is modeled on this defense with minor changes to allow more certain protection for an “innocent property owner” who may unknowingly purchase contaminated property<sup>196</sup> or who owns property and is unaware of its current use as a methamphetamine laboratory by a third party.<sup>197</sup>

#### A. Proposed Language

In an enforcement proceeding under this chapter, the current owner of the property deemed contaminated shall have a complete defense to liability for the cost of decontamination if the property owner can prove by a preponderance of the evidence<sup>198</sup> that:

(1) the property was used as a laboratory for the manufacture of methamphetamine; and

(a) the owner lacked knowledge<sup>199</sup> of the methamphetamine contamination; or

(b) the contamination from the manufacture of methamphetamine was caused entirely by a third party<sup>200</sup> and use of the property as a methamphetamine laboratory was reasonably unforeseeable to the owner.<sup>201</sup>

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*Id.* Section 9601(35) defines the level of knowledge necessary for § 9607(b)(3) to apply. *Id.* § 9601(35). For the defense in Washington’s CERCLA counterpart, see WASH. REV. CODE ANN. § 70.105D.040(3) (“The following persons are not liable under this section: (a) Any person who can establish that the release or threatened release of a hazardous substance for which the person would be otherwise responsible was caused solely by: . . . (iii) An act or omission of a third party (including but not limited to a trespasser) . . . [or] (b) Any person who is an owner, past owner, or purchaser of a facility and who can establish by a preponderance of the evidence that at the time the facility was acquired by the person, the person had no knowledge or reason to know that any hazardous substance . . . resulted in or contributed to the need for the remedial action, was released or disposed of on, in, or at the facility.”).

196. See, e.g., Jerome et al., *supra* note 1, at 52 (describing the Needhams’ situation in which they learned after they purchased their home that it was used as a methamphetamine laboratory).

197. See, e.g., Graff v. Allstate Ins. Co., 54 P.3d 1266, 1267 (Wash. Ct. App. 2002) (noting that the owner discovered that the tenant as well as others who may have been hiding on the property manufactured methamphetamine on the property).

198. See 42 U.S.C. §§ 9601(35), 9607(b)(3) (requiring preponderance of the evidence standard); WASH. REV. CODE ANN. § 70.105D.040(3)(b) (same).

199. See 42 U.S.C. § 9601(35) (defining level of knowledge required for defense); WASH. REV. CODE ANN. § 70.105D.040(3)(b)(i)-(iii) (same).

200. See 42 U.S.C. § 9607(b)(3) (third party defense); WASH. REV. CODE ANN. § 70.105D.040(3)(a)(iii) (same).

201. See 42 U.S.C. § 9601(35)(B)(i) (2000); WASH. REV. CODE ANN. § 70.105D.040(3)(b)(i). The proposed language here for unforeseeability is a gloss on the knowledge required in CERCLA or Washington’s MTCA for the third party defense, that paraphrases the catch-all language that “reason to know” includes “all appropriate inquiry,” “consistent with good commercial or customary practice,” and “commonly known or reasonably ascertainable information about the property.” *Id.*

(2) Knowledge of the methamphetamine contamination is presumed if the owner receives notice from a law enforcement agency,<sup>202</sup> state health department,<sup>203</sup> or if the status of contamination is filed on record with the deed in the courthouse of the county in which the property is located,<sup>204</sup> or in accordance with the notice provisions otherwise provided in this chapter.

If a property owner qualifies for the complete defense to liability, the property will be decontaminated according to the procedures set up in this chapter and any costs incurred for the decontamination will be covered by a fund established under this chapter.<sup>205</sup>

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202. See, e.g., ARIZ. REV. STAT. ANN. § 12-1000(A)(1)-(2) (2003) ("At the time of the discovery [of the methamphetamine laboratory] or arrest, [the law enforcement officer] shall deliver a copy of the notice of removal . . . to the owner of the real property if the owner is on the site at the time of delivery [and] . . . shall send the notice of removal by certified mail to the owner of the real property.").

203. See, e.g., WASH. REV. CODE ANN. § 64.44.030(1) (West, Westlaw through 2006 legislation) ("The local health officer shall cause the order to be served either personally or by certified mail, with return receipt requested, upon all occupants and persons having any interest therein . . ."); see also *supra* note 27 (providing example of Washington State Department of Health's list of contaminated properties, which can be accessed by property owners on the Internet).

204. See TENN. CODE ANN. § 68-212-507(a) (Supp. 2005) ("[T]he local law enforcement agency quarantining the property shall file, for recording, a notice of methamphetamine lab quarantine in the office of county register in the county in which the real property or any portion of the real property lies."); WASH. REV. CODE ANN. § 64.44.050(1) ("A release for reuse document shall be recorded in the real property records indicating the property has been decontaminated . . .").

205. For an example of such an account, see WASH. REV. CODE ANN. § 64.44.060(7) (establishing a decontamination account for enforcement of Washington's methamphetamine statute through funds received from fees collected under the chapter). Other sources might include money collected from state taxes or from restitution received from the methamphetamine manufacturer upon conviction for the manufacture of methamphetamine. See, e.g., TENN. CODE ANN. §§ 39-17-417(c)(2)(B) (2003); *id.* § 68-212-506 (allowing for restitution adjudged during enforcement of criminal drug laws to include costs incurred by the government to clean up property damage resulting from drug violation). For an argument weighing use of restitution to compensate victims of drug crimes, see Taylor, *supra* note 191, at 229-31 (claiming that restitution is within a judge's discretion and can be imposed at sentencing, but sometimes the injury to the victim has not been realized at the time of sentencing). In addition, states may receive federal funding for cleanup of methamphetamine waste if currently proposed federal legislation is enacted. See Federal Emergency Meth Lab Cleanup Funding Act of 2005, S. 259, 109th Cong. (2005) (providing, under section 2, funding for up to 90% of a property owner's cleanup costs if the property owner can prove that he did not have knowledge of the laboratory's existence before discovery by law enforcement, or if the property owner notifies law enforcement within twenty-four hours of discovery of the laboratory's existence); Clean, Learn, Educate, Abolish, Neutralize, and Undermine Production (CLEAN-UP) of Methamphetamines Act, H.R. 13, 109th Cong. (2005) (providing, under section 102, \$15,000,000 in grants to state and local government and private companies that respond to methamphetamine contamination on agricultural land, and under section 104, \$20,000,000 in grants to law enforcement for the identification and cleanup of methamphetamine laboratories).

### B. Analysis of Proposed Language

One of the reasons that CERCLA has withstood a takings challenge is because it contains a defense for innocent property owners<sup>206</sup> that allows property owners “who acquire a property after the disposal of hazardous wastes without any knowledge of its environmental contamination” to escape liability for cleaning up the contamination when the contamination was caused by the unforeseeable conduct of a third party.<sup>207</sup> Providing property owners with a defense to liability for the cleanup costs not only decreases the chances of a property owner succeeding in a takings challenge of the methamphetamine decontamination statutes,<sup>208</sup> but it also protects the “[i]nnocent members of the public”<sup>209</sup> in a larger sense by protecting the innocent property owners of the contaminated property in question.<sup>210</sup> A defense that hinges on the knowledge of the property owner may protect unknowing property owners from the health effects of exposure to the contaminated property and from liability for cleanup costs, whereas the current methamphetamine statutes only protect unknowing property owners from the health effects of exposure.<sup>211</sup> Under the proposed language, the property owner who can prove that he lacked knowledge will be protected from liability, but the property will still be decontaminated, with the costs provided from the chapter’s funding provision.<sup>212</sup> The knowledge definition in the proposed language is intentionally broad in order for the defense to be incorporated into a statute with or without a specific notice requirement to allow states more flexibility to collect, distribute, or require information concerning a property’s use as a methamphetamine laboratory.<sup>213</sup> Under this broad definition, the previous owner of the property who had the requisite knowledge of the property’s history as a drug laboratory might also be open to liability for cleanup costs, which could allow the state to seek action against the previous owner, as is possible under CERCLA or its state counterparts.<sup>214</sup>

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206. Cf. *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 734 (8th Cir. 1986); *United States v. Asarco Inc.*, No. CV 96-0122-N-EJL, 1999 WL 33313132, at \*1 (D. Idaho Sept. 30, 1999).

207. Nowak, *supra* note 68, at 838-39 (discussing “interplay” between 42 U.S.C. §§ 9601(35), 9607(b)(3)).

208. See *Ne. Pharm. & Chem. Co.*, 810 F.2d at 734; *Asarco Inc.*, 1999 WL 33313132, at \*1.

209. WASH. REV. CODE ANN. § 64.44.005 (West 2005).

210. See *supra* Part II.

211. See *supra* Part II.

212. See *supra* note 205 and accompanying text (describing possibilities for funding options in the proposed language).

213. See *supra* notes 104-105 and accompanying text (describing various notice requirements of selected states).

214. The notice requirements in some of the current methamphetamine statutes illustrate that encouragement of notice requirements may also allow an “innocent property

Placing the protection in the methamphetamine statute itself may provide more certainty as to who will end up paying the cost for methamphetamine decontamination because it does not rely on the fact-based balancing test employed in a regulatory takings analysis.<sup>215</sup> Instead, the statute provides specific elements that a property owner must prove, and if the property owner succeeds in proving these elements, the property owner unquestionably falls within the scope of the protection.<sup>216</sup> In addition, the statute provides protection for states by encouraging statutory notice requirements that would be sufficient to defeat a property owner's claims that he lacked the requisite knowledge regarding the metham-

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owner" to recover costs from a knowledgeable prior owner. See ARIZ. REV. STAT. ANN. § 12-1000(G) (2003) ("If an owner fails to provide any notice required by this section, the owner is subject to a civil penalty of one thousand dollars and is liable for any harm resulting from the owner's failure to comply with the requirements of this section."); CAL. CIV. CODE § 1102.18(b)(4) (Deering 2004) (repealed 2006) ("Failure of the owner to provide written notice to the buyer when required by this subdivision shall subject the owner to actual damages and any other remedies provided by law. In addition, if the owner has actual knowledge of the presence of any release of an illegal controlled substance and knowingly and willfully fails to provide written notice to the buyer, . . . the owner is liable for a civil penalty not to exceed five thousand dollars . . . for each separate violation, in addition to any other damages provided by law."); COLO. REV. STAT. § 25-18.5-103(2) (2005) (releasing owner from liability once "the clean-up standards and documentation requirements" are met); MONT. CODE ANN. § 75-10-1305(2) to (4) (2005) (releasing owner or agent from liability once methamphetamine contamination is reported to the subsequent owner or occupant and the property has been decontaminated).

215. See William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 801-03 (1995) (describing the uncertainty of the Court's takings jurisprudence after *Pennsylvania Coal Co.* and the difficulty that courts have in determining whether or not a taking exists); see also Wade, COURSE OF STUDY, *supra* note 38, at 358 (criticizing uncertainty of takings jurisprudence and calling for clarity in application).

216. It has been argued that the CERCLA defenses do not provide as much certainty for property owners in practice because they have been inconsistently interpreted by courts. See generally Nowak, *supra* note 68, at 841-45 (reviewing available case law interpreting the CERCLA "innocent landowner defense" and concluding, "[t]he innocent landowner defense has generated widely discrepant views as to what efforts are sufficient to fulfill the obligation of inquiry into the property"). However, because actions under CERCLA typically deal with commercial property owners, courts hold these owners to a higher standard of knowledge than residential property owners, see *id.* at 843-44, which would likely not be the case for the majority of owners who fall under the methamphetamine cleanup liability statutes. These owners are residential owners, who would not be held to as high a standard as a commercial owner subject to liability under CERCLA. See *id.* at 843-44; see also *supra* notes 5, 23 and accompanying text (describing residential property as the increasingly popular locus for clandestine methamphetamine laboratories). Furthermore, factual inquiry into the property owner's level of knowledge is much less problematic than inquiry into whether a regulation has gone "too far" under the "general rule" in *Pennsylvania Coal Co.* See Treanor, *supra* note 215, at 801-03 (quoting *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413, 415 (1922)) (describing the problems associated with interpretation of the "general rule" in *Pennsylvania Coal Co.*).

phetamine contamination.<sup>217</sup> As time passes, these notice requirements will serve to alleviate the burden on states to pay the costs of methamphetamine cleanup, because theoretically, fewer property owners will be able to claim that they are “innocent,” and therefore, should be released from cleanup liability.<sup>218</sup> However, this also depends upon a decrease in the number of properties used as “clandestine methamphetamine laboratories,”<sup>219</sup> which is where the focus would next turn to federal and state law enforcement of criminal drug laws to stop the spread of methamphetamine.<sup>220</sup>

#### IV. CONCLUSION

The methamphetamine problem in the United States is burdening the resources of state governments and law enforcement.<sup>221</sup> It is also burdening state legislatures as they attempt to craft legislation that will protect landowners and the public from exposure to methamphetamine by ensuring that the laboratories are properly cleaned and the status of the property as a former methamphetamine laboratory appropriately recorded.<sup>222</sup> However, these laws are also burdening property owners by either placing the burden of methamphetamine costs on the owners of property who unknowingly purchase property or by giving the property owners an option to decontaminate without requiring property owners with knowledge of the contamination to disclose the contamination to future interested parties. When states require property owners to pay the cleanup costs, it is possible that the state will have to compensate the property owner after

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217. If courts interpret the knowledge requirement narrowly and read the statute against protecting a particular property owner claiming the defense, then the state is afforded more protection in quickly being able to resolve the issue of who is going to pay for the methamphetamine contamination.

218. See *supra* note 24 and accompanying text.

219. See *supra* note 24 and accompanying text.

220. See generally Cazenavette Statement, *supra* note 19. This focus is outside the scope of this Comment, but illustrates the intersection of the criminal and property laws concerning the spread of methamphetamine in the United States.

221. This burden is from the standpoint of combating the spread of methamphetamine and preventing harm to the public from exposure to the chemical residue associated with its manufacture. See, e.g., W. VA. CODE ANN. § 60A-10-2(a)-(f) (LexisNexis 2005) (burden on state); see also Cazenavette Statement, *supra* note 19, at 14 (burden on law enforcement).

222. See IOWA BUREAU OF TOXICOLOGY, *supra* note 106, at 3 (“IDPH is working to find an answer [to the cleanup problem] that will protect the public and be practical for property owners.”); Hannan, *supra* note 20, at 24 (noting that a lack of standard leaves states to their own devices); James D. Polley, IV, *Capital Perspective*, PROSECUTOR, May-June 2005, at 43, 44 (“State legislatures are wrestling with controlling meth.”); Rineheart, *supra* note 9 (displaying conflicting opinions between regulators and property owners over methamphetamine contamination cleanup and the choices that regulators must make in drafting legislation).



a successful regulatory takings challenge in court. States can avoid successful regulatory takings challenges by including a defense in their methamphetamine contamination statutes that protects unknowing property owners, yet, at the same time, broadly defines knowledge to ensure that former methamphetamine laboratories are no longer clandestine.